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An Exploration of Theoretical Issues Related to Mediation Found in the Social Science Literature

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THESIS APPROVAL

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ABSTRACT

An abstract of the thesis of Cheryl E. Nally for the Master of Science in Speech Communication presented June 7, 1995.

Title: An Exploration of Theoretical Issues Related to Mediation Found in the Social Science Literature.

Mediation is a problem-solving approach to conflict management that is used more and more in virtually every context in which conflicts arise. This paper explores the wide range of meaning for the term 'mediation' as found in the social science literature and examines the question of what processes can properly be called mediation. It surveys the literature related to numerous theories of mediation and examines the meaning of the term as established in its various contexts.

The mediation literature can be divided into the following contexts: public sector or court connected mediation, divorce mediation, international mediation, environmental mediation, community mediation, small claims, and judicial mediation. This study delineates these contexts and differentiates them for the purpose of conducting an explication of the various meanings of the term mediation.

The term mediation is found to be used throughout the literature without operational definition and only broad generic definitions can adequately describe the processes which are called mediation. The boundaries between mediation and other processes are blurred as a result of this expansive use of the term. This study describes mediation as differentiated from other processes such as litigation, arbitration, conciliation, and process consultation.

Numerous concepts and issues are found in the literature related to mediation--caucus, goals, strategies and tactics, success, empowerment, ethics, mandatory mediation, neutrality, power and standards of practice. Many of these concepts are informed through contradictory debate within the literature. This paper describes these concepts and issues of mediation for the purpose of developing a further understand of the theory and practice of mediation.

This study also reflects on the critical issues, debates and contradictory expectations of mediation that have been raised within the literature and finishes by drawing some conclusions about mediation. Mediation is described as both art and science. No one process is appropriate for handling all or even most mediation situations.

AN EXPLORATION OF THEORETICAL ISSUES RELATED TO MEDIATION FOUND IN THE SOCIAL SCIENCE LITERATURE

by

Cheryl E. Nally

A thesis submitted in partial fulfillment of the requirements for the degree of

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ACKNOWLEDGMENT

My mother and my father accomplished educational goals far beyond their parents. I thank them for modeling the value of education. I thank my children for valuing education. I thank my family for their part in what I have accomplished.

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CHAPTER I

INTRODUCTION AND PROCEDURE

Introduction

Mediation is "one of the oldest and most common forms of conflict resolution" (Pruitt & Kressel, 1985, p.1). It has been defined as "a form of third-party intervention in a conflict with the stated purpose of contributing to its abatement or resolution through negotiation...It is not based on the direct use of force, and (it is) not aimed at helping one of the parties to win" (Zartman and Touval, 1985, p. 31). Pruitt (1981a) contends that mediation is the most common form of third-party intervention used in industrial conflict, international bargaining and divorce, and that it is becoming increasingly popular in other areas as well.

Lind (1992) states that those who discuss mediation theory generally hold an ahistorical view of mediation practice, as if wholly new and peculiarly American. The earliest writings appear to occur in 1680 when German jurist Johann Wolfgang Textor (Lind) provided an analysis of the

role and practice of mediation in relation to international law and disputes. Concern over the disorganized growth of alternative dispute resolution (ADR) techniques such as mediation has led to the need for independent theoretical grounding and justification, yet those who discuss mediation theory omit the historical perspective.

Formal mediation has been practiced for many years in two primary fields, international relations and labor-management relations, with the earliest theoretical and empirical works found in the international setting (Pruitt & Kressel, 1989). Kressel and Pruitt (1989) see a quiet revolution occurring in the field, with formal mediation now playing an increasing role in virtually every significant area of social conflict. New developments involve family and divorce settlements, small-claims cases, neighborhood feuds, controversies between landlords and tenants, decisions about the siting of dams and offshore oil rigs, and civil cases.

Merry (1989) finds Mediation an important mode of settling disputes with some of its earliest roots in the mediation that occurs in many small, nonindustrial societies. Though there are similarities with early tribal mediation and the mediation that occurs in American communities, there are substantial differences. The characteristics of mediation in nonindustrial societies consists of the utilization of village elders, or others who

are respected, influential community members with experience and acknowledged expertise in settling disputes. American professional mediators come most often from the fields of law or therapy, are generally unknown to the disputant or the community, and there is a growing group of inexperienced volunteers with limited training who are active in the areas of community dispute resolution and small claims court mediation.

Though mediation is an ancient phenomenon, research on how it works is relatively new with the earliest contributions dating about the early 1950's (Pruitt & Kressel, 1985). The 1960s American society saw a growing of interest in alternative forms of dispute settlement along with the creation of many causes and activist groups. Our own society's recent excessive amount of litigation has begun to produce a countermovement; Kressel and Pruitt (1985) cite the popularity of third-party mediation as a symptom of such a movement. In 1964 the Community Relations Service of the United States Department of Justice was established under the Civil Rights Act, employing mediators and conciliators (Roehl & Cook, 1985).

The acceptance of no fault divorce and the dramatic increase in numbers of divorces produced sweeping changes in divorce laws, leading to the establishment of conciliation and mediation services for divorcing couples. Attorneys in the 1970's began to offer no-fault legal services in divorce

dissolution cases and proposed a nonadversarial mediation model. Social workers and therapists who offered marriage and divorce counseling began to develop divorce mediation as a distinct aspect of their professional practice, emphasizing their ability and skills in dealing with emotional issues and child development.

Mediation became useful based on its ability to help educate parties. Because it is less bound by rules, it offers a personalized approach to dispute resolution, and the ability for parties to solve problems together with a minimum of state intervention (Folberg, 1983). Douglas (1962) finds it difficult to point to another such pragmatic development in society that has made use of relevant psychological insights.

The first volume of Mediation Quarterly, Sept 1983, according to Folberg (1983) help to develop mediation as a distinct professional practice and field of study. More and more varied parties and diverse professionals are becoming involved with dispute resolution, creating a blurring of the boundaries of dispute processes, and consequently confusion regarding what constitutes mediation within the field. Formal mediation over the last 10-15 yrs has been used in virtually every context in which conflict resolution is necessary, and is recently becoming institutionalized as part of, or adjunct to, court systems. Those who identify themselves as mediators are coming from diverse professions

of origin to practice mediation either in public or private practice.

Mediation arose out of necessity, the professionals (psychologists, social workers, and attorneys) came to the realization that the traditional theoretical models of their disciplines were deficient and ineffective in understanding or resolving family conflict. Benjamin argues that divorce and separation are simultaneously legal, interpersonal, and economic events and that treating divorce solely as a legal matter is dysfunctional and can be harmful to clients. Duryee (1985) implies that there is no longer any substantial debate that mediation is preferable to litigation in most divorce situations. Attorneys and clients find mediation more humane, administrators find it much less costly and several studies indicate that divorcing couples obtain a higher degree of satisfaction with mediation when compared to litigation.

Despite the growth of the ADR movement, the praise from its advocates, and the research favoring it, mediation is not a highly popular vehicle for conflict resolution. 1/3 to 2/3 of those offered mediation services decline, according to Pearson and Thoennes (1989). They suggest that Nation-states appear to have much in common with individuals. It takes very special levels of distress (such as the 'hurting stalemate') to employ mediation services. Mediation is often chosen as the lesser of two evils and

usually emerges from the disputants' despair about what they can achieve by unassisted dialogue.

Kressel and Pruitt (1989) find that the picture is mixed. They acknowledge that the mediation process is not uniformly practiced and that when looking at research results, it is difficult to draw definitive conclusions. An example of research in mediation is the concept of user satisfaction. While satisfaction is generally reported as high, this concept, 'satisfaction' is difficult to accurately measure and research may not reflect an objective evaluation of the quality of service.

This paper explores the wide range of meaning(s) of the term 'mediation' as found in the social science literature and examines the question of what processes can properly be called mediation. An overall review of the literature is conducted, in correlation to the numerous theories of mediation found in the literature. An explication by context identifies the various contexts in which mediation occurs and explores the descriptions of the mediation process in each context.

The lower-order concepts that contribute to an explication of the term mediation are then introduced. Many of these concepts are found in the literature with sometimes contradictory views and discussions. This study concludes by reflecting some of the critical issues that have been raised in the literature and finishes by drawing some

conclusions about mediation as it is discovered in the social science literature.

Procedure

Bibliographic Method

This study employs the bibliographic method. It consists of a broad, erudite search within the social science literature. This study contains a wide-ranging review of the literature (though not exhaustive) as suggested by Chaffee (1991). This review of the literature contains a search for the underlying meanings, concepts, assumptions, processes, constraints and issues within the located research, related to mediation.

This project began as I read an edited book printed in 1989 entitled Mediation Research (Pruitt & Kressel). It highlights the works of the current experts in the mediation field, including research in the many contexts that mediation is found: international, labor, civil, divorce and family, and public sector. This beginning led to an exploration of further literature by many of the same researchers as well as investigating citations found in these many works.

Helm and his associates (Helm, Odom & Wright, 1991; Helm & Wright, 1992; Helm & Moore, 1992) conducted three reviews of the psychological abstracts, one review of the years 1980 through 1985, another of 1986 through 1989 and

the last one of 1990 and 1991, in order to compare the levels of psychologists' interests in mediation as reflected in the numbers of publications found during these years (no abstracts were found in 1978 or 1979). Their search was conducted using the concepts 'conflict', 'mediation' and 'dispute resolution' as their indexes. They concluded their exploration with a categorization of the abstracts. Their study was based on the belief that dispute resolution has become synonymous with dispute mediation and that there has been a marked increase in interest within this area. Their findings show an increase in publications related to mediation beginning with one in 1980, peaking at 109 in 1985 then decreasing to 43 in 1991.

Using this increase in psychological interest in mediation as a base, I continued research of the mediation literature utilizing articles listed in Helms and associates' (1991, 1992, 1992) studies, particularly articles categorized as theoretical. Their focus was limited to articles that dealt with interpersonal conflict resolution (divorce and other family problems), omitting articles related to labor-management, international or other contexts within the mediation literature. While this was a useful beginning, my focus has been to look at mediation across contexts.

I searched the citations listed in the many articles I read and found several early works, which had been cited

often by different authors and were related to mediation theory, dispute resolution, conflict resolution, or third party interventions. I selected works that were cited as useful, theoretical, contextual, thematic, comprehensive, a chronicle, historical, a synthesis, containing models, or relating to concepts that I found repeatedly throughout the literature, such as neutrality, mediation as an art, practice of mediation, power of or within mediation, ethics in mediation, and mediation standards. My guiding question has been, 'Is there a single, comprehensive, coherent theory of mediation?'.

Littlejohn (1992) suggests that a function of theory is to focus attention on important relationships and variables. This study began by searching out works that articulate theoretical issues in mediation and I have attempted to draw out the relationships between the concepts used. Glaser & Strauss (1967) describe theory as process, an ever-developing entity, not as a finished or perfected product. They suggest the use of a discussional form of formulating theory to give a feeling of "ever-developing" to the theory, allowing it to become rich, complex, and dense, making its fit and relevance easy to comprehend. In this literature survey, I have chosen to include empirical studies, studies with data collection, field work, laboratory, ethnographic, or survey design, as well as articles written in axiomatic and prescriptive form.

Secondary Research Analysis

The methodology utilizes secondary research analysis, which consists of an examination of other researcher's work. The methodology used to produce this paper incorporates concept explication by mediation context, integrative research review, meaning analysis, distillation and synthesis of the lower order concepts related to mediation found in the literature. Chaffee (1991) says that operational definitions alone are less useful than explication because explication links both real world uses of concepts and terms with their uses in theory and research. Rather than only working out relationships between variables in research, he advocates looking at the relationships between the meanings of concepts and their uses to improve operational methods.

Explication

Explication starts with a focal concept, an ensuing literature review, and a processing of the literature to provide a picture of the conceptual and operational definitions the concept has been given. Chaffee (1991) indicates that three components of the literature--meanings, operational definitions and empirical findings--are important to the processing of the literature within explication. Chaffee suggests a meaning analysis be conducted to distill the abstract meaning of the concept in

relation to what the many differing investigators have said about it. A synthesis of concept meaning is produced, resulting in a theoretical understanding of the characteristic patterns to which mediation conforms, and contributing to the requirement that theory be explanatory and predictive.

Explication of the term mediation will be conducted as a contextual explication describing the different contexts. Numerous lower-order concepts related to mediation are explored within explication. Hempel (1952) indicates that an explication is not simply an analysis of a concept, but that the assignment of meaning comes about by way of "judicious synthesis, of rational reconstruction, rather than of merely descriptive analysis" (p. 11). An explication proposes a new and precise meaning for a concept rather than the commonly accepted meaning of the expression.

Integrative Literature Review

Cooper (1989) indicates that an integrative literature review summarizes past research by drawing overall conclusions from separate, related studies with the purpose of presenting the state of knowledge concerning the important issues in research related to the concept in question. Though Cooper is describing a method of analysis which is aimed at empirical studies (meta-analysis), this study will focus primarily on the use of integrative

research review in relation to literature which is not necessarily empirical such as ethnographic, survey, and prescriptions for practice, since there is little empirical research conducted within the mediation field. This study follows Cooper's suggestions related to selecting and reviewing literature.

Cooper (1989) suggested that a research review needs to follow the course of selecting material most consistent with "all relevant work" (p.40) regarding the subject, which helps minimize several possible research biases. He describes primary channels or sources of information, informal networking and personal libraries which tend to produce greater homogeneity in research findings and operations within a given journal network. Study bibliographies are also likely to overrepresent work that appears within the reviewer's primary network of journals.

This study began with such a homogenous beginning (from the reading of Mediation Research). I selected works cited in Mediation Research, or works that were written by the same authors, expanding my search to works of interest in the several journals in which mediation is found, Mediation Quarterly, Negotiation Journal and Conciliation Court Review. I looked for works that were cited in other articles. Cooper (1989) would call this the use of an ancestry or reference-tracking approach within my area of interest. He warns that these techniques will overrepresent

published research and "introduce biases associated with the tendency for journals to contain only statistically significant results and...conform to previous findings" (p.44).

Cooper (1989) suggests secondary channels of information in which the information gathered most closely approximates "all publicly available research", sources with the least restrictive requirements for a study to be published. He suggests the use of indexing and abstracting services, and the use of bibliographies prepared by others. Though this work began with a homogenous research review, it also incorporated three studies which had extensively researched the psychological abstracts from 1978 to 1991 and had prepared a comprehensive, categorized bibliography of abstracts related to ADR and mediation. It also contains a literature review conducted within the social work abstracts and ERIC, the educational abstracts.

In sorting through the numerous articles I had found, I attempted to organize them into some coherency. I first looked for articles with empirical studies, laboratory studies, any kind of data collection and analysis. I particularly noted that many articles were written in axiomatic (the presentation of self-evident truths) form, an example of which is Robert Castrey and Bonnie Castrey's (1987) article called Timing: A mediator's Best Friend in which they suggest that people are not born with a fully

developed sense of timing and that a mediator must be careful in the use of timing during mediation.

Other articles were found to contain discussions regarding mediation principles without empirical explanations, and still others constitute prescriptions for practice. Taylor (1988) as well as Donohue (1989) and Milne and Folberg (1988) each prescribe the use of stages or steps of mediation, though they do not agree on the number of stages or what is included in each stage. Some articles discuss issues and concepts related to mediation (such as neutrality and ethics in mediation), trying to shed new light, while others were extensive reviews of the literature (Wall 1981 & 1993).

According to Cooper (1989), a literature search can begin with only a conceptual definition; the researcher is able to evaluate the conceptual relevance of different operations within the literature. The term mediation is associated with several other dispute resolution concepts, such as arbitration, alternative dispute resolution (ADR), divorce mediation, labor mediation, and international mediation. It is defined within the literature in a variety of ways. The basic description of mediation is "assistance to two or more disputing parties by a disinterested third party to resolve the dispute" (Kressel & Pruitt, 1985, p. 180).

Synthesis Research

Noblit and Hare (1988) advocate synthesis research and consider it essentially interpretive. They suggest interpretive synthesis research be emic in that it gathers data on values and attitudes directly from the practitioners (in some contexts, the mediation literature is contributed to primarily by practitioners), that it be holistic, locating research in relevant, identifiable context, and that the synthesis incorporates a historical perspective. Within mediation research there are a wide variety of theories with differing philosophical assumptions, claims, strengths and weaknesses. The principle task of this project is to integrate the literature through review, bringing together theory, concepts and research, to determine theoretical underpinnings in the literature, and search out coherency in the meaning(s) and uses of mediation as well as concepts related to mediation.

This study will begin with a wide exploration of the mediation literature, examining theoretical issues related to mediation. This study will explore the wide range of meaning of the term 'mediation' within the literature, providing an explication, while exploring adjacent contexts, pertinent issues, and practices related to mediation.

The word mediation is abstract and possesses multiple meanings. Chaffee (1991) suggests conducting a meaning analysis, the process of analyzing the meaning of a concept

through distillation, as a way of explication. He suggests a distillation of the abstract meaning of a concept through reading what the many different analysts have said about it, boiling the ideas down to essential elements and producing the central meaning(s), and the contexts in which they are used. Terms and concepts are frequently used in research without explicit definition.

An example of the use of terms in research without clarity is shown in the following description of the concept neutrality. Many researchers use the term neutrality, within a definition of mediation such as "a neutral third-party" without delineating what is meant by the term. Other writers suggest simply "third-party" with no reference to neutrality. This implies an inconsistency in investigators' acceptance of the need for neutrality within mediation. These differing inferences in the literature can be distilled through the exploration of their uses, and possibly produce multiple meanings and contextual definitions.

The following is a description of the organization of this study. The first section begins with an introduction and a description of the methodology. Chapter II contains an extensive literature review which outlines the many theoretical perspectives in the mediation literature. Numerous researchers have described the stages of mediation as well as the strategies and tactics used in mediation.

There are numerous communication theories related to mediation, such as social exchange, systems theory, role theory, structured mediation, social learning theory, and mediation analysis. This study will survey and describe this rich array of theories as found in the literature.

Following this survey of diverse theories related to mediation, the relationship of mediation to conflict is explored. Mediation theory is a response to changes in thinking related to conflict and spawns the question: Does conflict need to be 'resolved' or is it more desirable to 'manage' conflict? Mediation is a response to conflict which embodies a shift in thinking, a paradigm shift from an authoritative judicial structure in which the individual needs to be controlled by outside measures, to a less formal structure in which the individual can cooperate with a process in which the parties work together to resolve or manage conflict.

A further issue in the literature with regard to conflict is the debate as to whether mediation is a cooperative, win-win venture or whether it more closely fits the competitive, win-lose perspective. This issue is explored in relation to the concept of third-party control, differentiating interventions or dispute resolution processes by the power of the party in the middle.

Theorists describe models of mediation related to relational and content control, suggesting that mediation is

more focused on the content of the conflict than the relationship between the parties. A difference of opinion exists as to whether mediation is primarily concerned with the objective, content, task aspects of the dispute or whether it encompasses both content and the relational, subjective, process aspects of disputing. Several models are introduced which address process and or content control.

A further section of this study investigates third-party control. Several authors have addressed third-party control as a way of distinguishing between mediation and other processes such as arbitration and process consultation. Embedded in the discussion of third-party control is the question of whether mediation includes active, directive techniques or whether mediation more properly utilizes a passive, nondirective stance which empowers parties to direct the course of the dispute resolution process.

Chapter III conducts an explication of the term mediation, beginning with definition and extending to a description of how mediation is distinguished from other dispute resolution measures. Explication necessitates an exploration within the many contexts in which mediation is found, contexts such as judicial mediation, divorce mediation, mediating public disputes and environmental mediation, international mediation, community mediation, and labor. These contexts of mediation are presented within

their historical perspectives.

Chapter IV locates numerous concepts and issues related to mediation. Many of these concepts are vigorously debated within the literature, often interjecting disputing scholarly opinions and contradictory expectations. These are lower-order concepts found to exist within the practice of mediation. I have selected the primary concepts as identified by their location within the literature. The selection process for these key issues is that they were either found most often; were presented with differing viewpoints as to their acceptance within the practice of mediation; or they were described as important and necessary to the understanding of mediation.

These concepts include caucus, saving face as a mediator strategy, goals of mediation, success within mediation, empowerment of the parties, ethics in mediation, mandatory mediation, neutrality in mediation, power, models of mediation related to power and neutrality, and the standards of practice.

Chapter V concludes this study with a look at some of the critical issues related to mediation found within the literature.

CHAPTER II

OVERVIEW OF THE MEDIATION LITERATURE

Review of the Literature

This chapter provides a survey of the mediation literature for the purpose of bringing together the numerous theories of mediation and creating a better understanding of the nature of the mediation process. Mediation research draws on the methods and intellectual traditions of law, psychology, sociology, industrial relations, anthropology, political science, communication, social work and public policy (Kressel, Pruitt & associates 1989). Though one of the oldest and most common forms of conflict resolution, researchers suggest that the empirical research on mediation is in its early, rudimentary stages (Wall, 1981; Fisher, 1983; Rubin, 1980; Pruitt & Kressel, 1985; Kressel, Pruitt & associates 1989).

The implication of this research is that mediation works, in the sense that public satisfaction with the process is generally high and that constructive agreements are frequently reached under its auspices (Kressel, Pruitt &

associates; Kressel & Pruitt, 1985; Pruitt & Kressel, 1985). The literature suggests that mediation is a practical application of an effective problem-solving technique and has proven itself useful.

Pruitt and Kressel (1985) suggest that "a rich set of ideas can be found in this literature, though it can hardly be said that an integrated theory has emerged" (p.5). Rehmus (1965) suggests that mediation has resisted orderly and systematic analysis with no clear agreement as to its nature or function. He implies that the profession of mediation has traditionally been hostile to rating its successes or failures by theoreticians, and has not welcomed careful analysis in the past (though it appeared to him to be changing with the introduction of mediators who have an increasing understanding of the uses of theory as well as practice). He attributes this lack of systematic analysis to the supposition by practitioners that mediation is an art rather than a science, and that the application of general rules is not possible.

Slaikeu, Culler, Pearson, and Thoennes (1985) suggest most of the mediation literature has been anecdotal, descriptive, prescriptive, or focused at distinguishing mediation from other third-party interventions, while a limited literature has focused on the steps in the process, the tasks of the mediator, and the numerous techniques. Slaikeu et al. find that much of the mediation literature is

based on self-reports or observations and qualitative analysis, units of analysis have not been uniform, and researchers make assumptions about intent. Wall (1993) in his review of a decade of mediation literature found that half of the articles published during that period were based on "the author's ideas, opinions, and informal observations" (p. 187).

Carnevale and Pegnetter (1989) suggest the reason for the lack of data from professional mediators has been the highly confidential nature of the mediation process, particularly under collective bargaining laws. Slaikeu, Pearson, Luckett, & Myers (1985) find that the growing popularity of mediation is not matched by research of the process and techniques. Wall and Rude (1989), in their search of the literature, discover that the literature related to judges acting as mediators consists of self-reports and "thinkpieces" by judges (judges facilitating settlements in civil cases), but locate no empirical research.

Greatbatch and Dingwall (1989) indicate that self-reports by participants have been shown to be unreliable as data. Participants try to give accounts that bolster their view of themselves as competent social actors; in the case of mediators, accounts are constructed as part of the process of building demand for their services. Townley (1992), in his search of the literature for multicultural

research, could find only anecdotal themes.

Early writers who began to look at the theoretical issues in mediation speak of an early distrust and reluctance to conduct research in the field. Carnevale and Pegnetter (1989) suggest that the confidential nature of labor negotiations contributed to this aversion to allowing research. Douglas (1962) found it difficult to conduct field research in labor negotiations, and spent many months attempting to find a mediator and participants in a dispute who would agree to cooperate with her field study.

Dukes (1990) reviewed the literature to determine if the purported goals of community mediation were found to have been empirically met, goals such as reduction of interpersonal violence, delivery of services, social transformation and personal growth. He found from his review that "it is difficult or impossible to discover empirically whether these goals have been met" (p. 29). While major newspapers produce glowing reports of the success of community dispute resolution, actual research findings or criticisms are found in obscure journals meant for a small audience. Research results are obtained from limited samplings, and while programs vary considerably, these results, according to Dukes, do not necessarily reflect the local community.

A review of the literature on mediation found in the social sciences has produced many contradictory findings. A

number of the central tenets of mediation, such as the ideal of self-determination, neutrality of the mediator, and mediation's advantages over litigation are not supported in the literature. There are many fine empirical and qualitative studies which support the uses of mediation and the benefits, but these studies do not necessarily allow mediation to live up to the idealistic model which appears to exist among advocates, practitioners, and theorists. This study explores those contradictions and attempts to draw conclusions regarding the meaning of mediation and its uses. The next section looks at many of the theories that have been discussed in relation to mediation. There exists a prolific number of approaches that have attempted to explain the mediation process.

Theoretical Perspectives in the Mediation Literature

Mediation began as a practice rather than a scholarly innovation. Pruitt (1986) likens the field of mediation to the field of medicine in the early 18th century. It consists primarily of practitioners. The training of these practitioners is most often that of apprenticeship, and they often perform intuitively, utilizing individual styles.

The literature arises mainly from the experience of practitioners, consisting primarily of aphorisms regarding appropriate action, and "there is a lot of sound advice around" (p. 237). The field, he concludes, continues at a

primitive level of development. While the medical literature is filled with scientific theory, the field of mediation exists primarily of maxims, prescriptive advice, rules of thumb, and concise statements about what to do and not to do.

Maxims are important and insightful, but according to Pruitt (1986), should not be mistaken for theoretical statements. Maxims refer to strategies, not variables and are particularly lacking when it comes to reporting effects. They say what should be done, but not how it will turn out. Theory lends itself to empirical test while a maxim does not. Pruitt gives as examples of maxims, "Talk about your own and the other party's interests" or "Maintain good working relations with potential adversaries" (p. 238).

Blades (1984) indicates that the wide range of mediation styles, theories and practices is a result of a lack of professional standards, the relative newness and growth within the profession, and the diversity in training of practitioners. Wall (1981) as well as other researchers (Fisher, 1983; Rehmus, 1965; Pruitt & Kressel, 1985; Zartman & Touval, 1985; Kressel & Pruitt, 1989; Wall, 1981; Hiltrop, 1985; Bercovitch, 1989; Kressel & Pruitt, 1985; Carneval & Pegnetter, 1985; Potapchuk & Carlson, 1987; Benjamin, 1990; Stevens, 1963) contend there is relatively little theoretical analysis of the process. "Despite its variety, longevity, and seeming ubiquity, mediation remains

understudied, less than understood and unrefined" (Wall p.157). Much of the literature on the actual process of mediation describes the numerous stages, phases or steps in the process, the following is a discussion of those theoretical approaches to the practice of mediation.

Stages of Mediation

Deconstructing mediation into its many perceived parts is a popular method of attempting to understand and recreate it. Most researchers submit that mediation is a process which takes place in discernible stages or phases (used interchangeably) (Kressel, 1972; Pruitt, Mcgillicuddy, Welton & Fry, 1989; Donohue, 1989; Milne & Folberg, 1988; Taylor, 1988). Though there are several models with varying numbers of stages or phases in which a mediated event may pass through from its inception to completion, the models remain somewhat consistent.

Kressel proposes three stages in mediation which are each characterized by a type of tactic which occurs in that stage. First are reflexive tactics, designed to establish rapport, then nondirective tactics, designed to encourage disputants in discovering mutual solutions, and last, the directive tactics in which an acceptable solution is found.

Pruitt, McGillicuddy, Welton and Fry (1989) examined the mediation literature and described the five stages of mediation with the distinct types of tactics used by

mediators in each of these stages. Their five-stage decision-making model consists of; the mediator 1) gathers information, 2) poses the issues for themselves and the disputants, 3) facilitates and/or generates and evaluates alternatives, 4) precipitates decision making and 5) facilitates the planning for implementation.

Blades (1984) suggests five stages of mediation. In his model, the first and last stages are distinct and delineated, while the middle stages are less clear and may overlap. His stages are introduction, definition, negotiation, agreement, and contracting. Cramer and Schoeneman's (1985) five stages are orientation, initiation, exploration, formulation, and finalization. Kochan and Jick (1978) indicate that one of the most universalistic principles of mediation is to gain trust and confidence from the parties. Most models of mediation consider gaining trust from the parties to be the first order of business (Kressel, 1972; Keashly, Fisher & Grant, 1993; Markowitz & Engram, 1983; Zartman, 1981; Taylor, 1988)

Taylor (1988) describes seven stages in the mediation process each of which has its goals and tasks as well as methodology and skills. In stage 1, Taylor includes creating the structure and building trust with the introduction and gathering information stage from the Pruitt et al (1989) model. In Taylor's model, stage 2, 3 and 4 are similar to the Pruitt et al model, involving the issues,

alternatives and decision making. Stage 5 involves writing the plan. Stage 6 is determining legal processes that may be necessary, and stage 7 is again like the 5th stage in the Pruitt et al 5 stage model, implementation of the agreement.

Milne and Folberg (1988) suggest an eight stage model in which they have proposed similar stages to the previous models, with the decision making stage separated into three stages--compromise, agreement and review. The second stage in their model is fact-finding and disclosure which is included in stage 1 for the Pruitt, et al, Blades, and Taylor models. Donohue (1989) concurs that most mediation professionals advocate using phases as a means of moving disputants through some kind of controlled decision-making process. He describes four phases which are derived from the preceding models--orientation, gathering information, identifying issues and developing proposals. He suggests a general consensus on the usefulness of looking at phase theory or stages of mediation as a way of describing the mediation process, particularly when devising mediation training.

Though there are numerous stage- or phase-theory models of the mediation process, it is generally acknowledged by practitioners and theorists that mediation progresses through differing, and fairly predictable intervals. While writers divide or categorize the stages differently, according to Folberg (1983) they appear to agree that there

are some common components: introduction and orientation, fact-finding and disclosure, isolation and definition of issues, exploration and negotiation of alternatives, compromise and accommodation, tentative agreement, review and processing of the resulting settlement, and finalization and implementation.

While there is acceptance of phase theory in mediation, there is no consensus as to what is the proper number of stages, or which stages most accurately reflect the mediation process. There is acceptance of the stages of mediation, though they may be done in differing patterns in different contexts and by different mediators. The process of mediation is not an exact science, but a pragmatic endeavor, which allows room for a varying number of procedures which can exist under the label of mediation.

Strategies and tactics are terms used throughout the literature and are discussed in the next section.

Strategies and Tactics

Kressel and Pruitt (1985) acknowledge a virtually limitless array of interventions, strategies, techniques, and tactics that mediators employ during the process of mediation. These terms, though widely used throughout the literature, are seldom defined or explained. Murray (1986) suggests that the lack of precision with which practitioners and theorists use terms like strategy and tactics adds to

confusion within the field.

Mclaughlin, Lim and Carnevale (1991) define strategy as a plan of action towards resolution of the dispute, while a tactic is a technique for achieving those objectives. Kolb (1983) agrees there is confusion regarding the meaning of terms even within empirical research and suggests that it has led to misrepresentation, misinterpretation and misunderstanding. She suggests that the difference between strategies and tactics is that strategies are "what mediators say they do", and tactics are "what they actually do" (p. 248).

According to Kolb (1983), strategies refer to abstract and general statements made by mediators and are studied generally through self-reports. Though mediators may discern and agree on the strategies they use, they may disagree on the how they are operationally or tactically accomplished and which tactics they would choose to use in accomplishing a particular strategy. Kolb indicates that tactics are operational, they have no meaning by themselves and can only be understood within the context of a particular strategy. She notes that using the term strategy makes mediators appear scientific and methodical, perhaps more than they actually are. She also notes that practitioners do not use the term strategy. The mediation literature contains many explanations of mediator strategies and tactics.

Bercovitch (1989) delineates three basic types of strategies used by mediators, 1) communication strategies which include acting as go-betweens, clarifying and supplying information, 2) formulation strategies which are defined as identifying issues and suggesting concessions, and 3) manipulation strategies which involve promising rewards and threatening sanctions.

The mediation literature describes strategies and tactics as well as techniques used by mediators. Wall (1981) proposes a mediation model in which the techniques utilized by mediators include setting up the negotiation, separating the parties, providing advice to an inexperienced representative, offering proposals, serving as a sounding board for both sides, protecting the negotiators from third parties and staying out of the way.

Wall (1981) categorizes 101 different techniques used by mediators. His categorization is based on the diverse relationships that exist between the mediator, the participants and each of these member's constituents. He locates these relationships within a mediated negotiation paradigm and considers the relationships within the paradigm as ones of exchange, in which the parties have expectations, receive rewards and incur costs as they deal with the other parties. Each person within the interaction estimates probabilities related to rewards and/or costs.

Hiltrop (1985) conducted an analysis of 13 mediation

techniques, linking technique with dispute outcome and dispute characteristics. Her techniques were a further extension of Wall's (1981) work. The following is a list of these techniques.

Table 1: Hiltrop's 13 Mediation Techniques

1. Act as a communication link between the parties
2. Suggest solutions
3. Discuss the strengths and weaknesses of a party's bargaining position in a closed meeting.
4. Make procedural arrangements
5. Suggest to refer all or some of the issues for settlement to fact-finding/arbitration.
6. Help one or both parties retreat 'gracefully' from an earlier position.
7. Threaten to quit if no progress is made in the negotiations.
8. Synchronize the making of mutual concessions.
9. Assist the negotiators in their relationships with constituents.
10. Reduce emotional tensions between parties.
11. Arrange preliminary meetings with the parties separately to explore the issues in dispute and the attitudes of the parties.
12. Arrange joint negotiation sessions under the chairmanship of the mediator.
13. Separate the parties and deal with each party separately in closed meetings.

(Hiltrop, 1985 p. 86)

Hiltrop (1985) found that only seven of the 13 mediation techniques were significantly related to the settlement of the dispute. Numbers 1, 7, 9 and 13 were found to contribute most to a settlement while numbers 4 and 10 were associated most often with nonsettlement of the dispute.

Carnevale and Pegnetter (1985), building on Kressel's (1972) three mediator tactics--reflexive, nondirective, and

directive (see pg. 27)--and Wall's (1981) work, introduce 37 commonly used mediator tactics in their study. The following is a list of these tactics, in order, starting with the most often used by mediators (# 1), continuing through to the least often used tactic (# 37), the numbers on the right are the order in which the effectiveness of each tactic was rated by the mediators.

Table 2: Carnevale and Pegnetter's 37 Tactics

1.	Developed rapport	1
2.	Compromise suggestions	5
3.	Pressed hard	3
4.	Gain trust/confidence	2
5.	Let them blow off steam	4
6.	Suggest a settlement	11
7.	Argued their case	9
8.	Focus on issues	7
9.	Frequent caucuses	6
10.	Caucus only on issues	8
11.	Costs of disagreement	19
12.	Simple issues first	10
13.	Avoided taking sides	12
14.	Discussed other settlements	13
15.	Controlled timing	15
16.	Said they were unrealistic	22
17.	Spoke their language	17
18.	Noted next impasse step no better	23
19.	Clarified needs of other	20
20.	Used humor	21
21.	Change their expectations	24
22.	Suggested trade-offs	16
23.	Make face-saving proposals	18
24.	Used late hours	25
25.	Assured them of other's honesty	26
26.	Prioritized issues	28
27.	Simplified the agenda	14
28.	Kept them at the table	29
29.	Expressed pleasure at progress	30
30.	Developed framework	32
31.	Taught them of impasses process	31
32.	Dealt with constituent problems	27

33.	Controlled hostility	33
34.	Expressed displeasure at progress	35
35.	Suggested review of needs	36
36.	Helped 'save face'	34
37.	Took responsibility for concessions	37

(Carnevale & Pegneter, 1985 p. 73)

Contingency Approach to Strategies and Tactics

Kressel and Pruitt (1985), Wall (1981), Hiltrop (1989), Wall and Rude (1989), Carnevale, Conlon, Hanish and Harris (1989), Carnevale and Pegnetter (1985), and Carnevale, Lim and McLaughlin (1989) demonstrate that successful mediators are adaptive, they do different things in different situations. Each of these researchers submit that mediators select tactics or strategies utilizing a contingency approach. This approach starts with the assumption that mediator activities are highly effective under some conditions and ineffective under others. Mediators engage in efforts to evaluate the interaction, including causes of an impasse, source of the dispute, and the goals of the parties involved. They then adjust their behavior to attempt settlement of the dispute.

Carnevale, Conlon, Hanisch & Harris (1989) have proposed a strategic-choice model of mediation from first hand observations of professional labor mediators, and case analyses of organizational and international mediation. This model predicts the strategies that mediators select in different circumstances. They suggest four basic mediator

strategies which can be viewed as manifestations of different forms of social power--integrate, press, compensate and inaction. The choice of pressing, compensating, integrating, or inaction in mediation is based on strategic analysis. The choice of a particular strategy is determined by the mediator's assessment of its costs and benefits, its feasibility and the mediator's incentives.

Carnevale and Pegnetter (1989) suggest two factors which determine a mediator's choice of strategy--mediator's concern for the parties' aspirations and the mediator's perception of common ground. Their model proposes a high-low continuum of each factor and locates points on a graph which will predict which strategies a mediator will choose. Lim and Carnevale (1990) indicate that mediation tactics leading to successful conflict resolution in one dispute are irrelevant or detrimental in another.

Lim and Carnevale (1990) suggest that mediators find it cognitively taxing trying to keep track of the appropriate tactics to use and therefore develop cognitive schemas linking the types of disputes, the tactics they use, and the outcomes achieved. Lim and Carnevale developed taxonomies of disputes, outcomes and mediator behaviors. Their study supported and extended Kressel and Pruitt's (1985) three general categories of reflexive, substantive, and contextual tactics while also determining that mediators also classify dispute situations and mediated outcomes into basic types.

Several of the studies which looked at mediator strategies, used outcome of the mediation as a variable, determining whether a settlement was reached during mediation (Hiltrop, 1985; Carnevale & Pegnetter 1985; Wall, 1981; Shapiro, Drieghe, & Brett, 1985). Among other variables considered were trust and confidence in the mediator (Kolb, 1985; Carnevale & Pegnetter; Carnevale, Lim & McLaughlin, 1989; Wall, 1981; Kressel & Pruitt), the sources or features of the dispute (Bercovitch, 1989; Carnevale & pegnetter; Wall & Rude, 1985; Hiltrop; Carnevale, Lim & McLaughlin, 1989), and timing of the use of interventions (Hiltrop; Donohue, 1989).

A consensus among researchers is that with a better understanding of how mediators identify dispute sources and select mediation tactics, mediators may become more adept at facilitating the process of negotiation. Though there are many and varied strategies, tactics and techniques in mediation, there is little agreement as to their uses.

Communication Theory Related to Mediation

Burrell, Donohue and Allen (1990) examine the interventionist model of mediation which characterizes the mediator as a "competent communicator" who assumes an active, highly participatory role in the process. The interventionist evaluates the quality of the agreement, works to equalize power if there is an imbalance, and

controls the process rather than the content of the mediation. This active role is employed to empower participants to resolve their own conflict and is not linked to content control.

According to Donohue (1989), the communicative competence model in divorce mediation assumes that the mediator will actively intervene using communication strategies and tactics designed to create a collaborative dispute resolution. The competent communicator must be aware of communication rules used by the particular speech community to interpret events (Donohue, Allen & Burrell, 1985).

Donohue, Allen and Burrell (1985) have developed a method of coding mediation interventions that identifies three strategies--structuring the process, reframing the parties' positions, and expanding information. Their research found that successful mediators were more likely to use structuring and reframing tactics and that they framed them as interruptions to the parties' interactions.

Slaikeu, Culler, Pearson, & Thoennes (1985) study quantitatively the verbal behavior of mediators and attempt to determine if and how these behaviors are related to settlements. Success was operationalized as settlement within their study and their results suggest that successful mediators spend less time coaching spouses on how to negotiate, make fewer attributions about what others think

or feel and more often engage in behaviors related to consolidating an agreement.

One possible explanation for these findings offered by Slaikeu et al (1985) is that the communication skills of the participants is related to the behaviors of the mediator and to settlement. Taylor (1988) indicates that the mediator uses communication skills such as open-ended questions, summarizing, reflection and clarification. She delineates when these skills should be used during the process.

Social Exchange and Roles

Researchers have analyzed mediation within a number of theoretical contexts. Parker (1991) examined mediation in a social exchange framework, observing that most of our social behavior can be interpreted as exchange, perceived rewards and costs. The use of a social exchange framework is valuable for investigating the communication exchange behaviors of disputants and mediators. Landsberger (1955) conducted an interaction process analysis of mediator behavior utilizing Bale's theory of small groups as the framework. Interaction process analysis allows a description of role behavior and individual deviations from the role. Landsberger found that mediators combined the role of task leaders with that of leadership in the social-emotional area of mediation activities. He found that role behavior is capable of being described in terms which are

quantitative and meaningful within a theoretical framework.

According to Zartman and Touval (1985) mediators can play three roles--communicator, formulator, and manipulator--in securing an outcome. Kolb (1981)'s study of mediator roles found that mediators in federal and state agencies saw themselves in the role of either "dealmakers" utilizing an active role in the mediation process or as "orchestrators" employing a less directive role.

Stuart and Jacobson (1987) utilize a social learning theory perspective which combines cognitive theory, systems theory, and social exchange theory to provide the mediator with guidelines useful in optimizing the mediation process. Social learning theory recognizes that parties interact, change and are changed through interaction, offering an expansionist focus rather than reducing the process to individual components. They suggest six steps in the process--gain acceptance, help parties adopt a conciliatory stance, facilitate communication, facilitate present-oriented resolutions, help parties find creative ways to resolve their differences, and help them feel satisfied with the agreement.

Systems Theory

There are many researchers in the divorce and family mediation area who suggest viewing mediation from a systems perspective, that the family unit operates as a system.

Davis and Salem (1984), Amundson (1991) and Saposnek (1987) suggest a systems approach to mediation. The mediation process is seen as one holistic entity in which each part (person) is not separate from the other parts, but is seen in relation to the others. According to Amundson, each participant's view of reality is equally valid. He suggests that viewing mediation from a systems perspective provides opportunities for the mediator to interfere with the patterns of interaction in order to learn about the operation of the system.

The mediator must do "something", which provides "punctuation" within the system. The results of the action of the mediator provide information regarding the system. What is said or intended by one party is less important than what was heard by the other party. Though wishing for change, individuals in conflict will continue repeating patterns of interaction and power, becoming stuck by repeating what is familiar. The mediator can introduce change in the system through reframing the interaction.

A cybernetic view of mediation looks at <u>what</u> happens, rather than <u>why</u> something happens (Amundson, 1991). The emphasis is on process. What occurs in response to an action is what interests a systems mediator. A cybernetic model of mediation utilizing systems theory emphasizes solution-generation rather than problem analysis (Amundson, 1991).

Saposnek (1987) utilizes a systems perspective and the principles of the martial art of Aikido in mediation. He suggests that the mediator use the principles of Aikido to counter the "attacks" of the disputants. An Aikidoist never confronts or clashes with the challenger, instead he/she accepts, joins and moves responsively with the flow of the challenger's energy in the direction in which it is going. A mediator using these principles will not confront the disputants but instead will join with their energy and move with it in ways that imbalance and surprise them.

Structured Mediation, Social Learning Theory, Social Interaction and Problem Analysis

Grebe (1988) expanded O. J. Coogler's (often called the father of divorce mediation) notion of structured mediation, which consists of a set of rules designed to establish the parameters and provide instructions for participants in divorce mediation. The structured mediation rules are compiled from the laws of states with more advanced thinking related to divorce and support.

Volkema (1986) suggests that through mediation, disputants learn problem-solving techniques. He integrates a social learning theory approach employing the identification of mediation strategies and techniques, with the goal of improving the state of theory in divorce mediation. Kolb (1985) proposes a dramaturgical analysis,

utilizing the metaphor of the theater, to provide a framework for considering the expressive domain of mediation. This structure is based on social interaction that emphasizes mediation's ambiguous features, integrating impression management and the meanings of behavior and events.

Raiffa (1983) advocates for the use of problem analysis in mediation. The mediator performs an analysis of the situation for the parties in dispute, drawing pertinent and necessary information from both parties. An analysis done by an impartial mediator may be more acceptable to the parties than one done by one or the other. This may be particularly useful when the problem is complex with technological and political constraints.

Much of the mediation literature discusses mediation and its relationship to conflict. The following is a discussion of mediation and its response to a change or shift in thinking regarding conflict and the practice of conflict resolution or conflict management.

Mediation and its Relationship to Conflict

Conflict Management and Conflict Resolution

Mediation according to Wall and Lynn (1993) comes from the Latin root mediare which means to halve, in Chinese it means to step between two parties and solve their problem,

and in Arabic, it refers to manipulation. The developing ADR (alternative dispute resolution) movement is a response to conflict and explores both the resolution of conflict and the management of conflict (Avruch & Black, 1990). Kerr (1954) suggests that conflict is inevitable (a labor union which wholly agrees with management ceases to be a union), it cannot be eliminated, and it can serve important social functions.

Murnighan (1986; Rubin, 1980) says that within the study of conflict, mediation is a central issue, receiving substantial attention, and is most often used. Taylor (1988) states that mediation is essentially concerned with interpersonal conflict, disagreements that involve individuals, or groups of individuals. Conflict as studied in the social sciences, investigates the causes of conflict as well as behavioral and social manifestations of conflict. Within the negotiation and mediation field, conflict is studied in terms of resolution, management, and agreement. Kiely and Crary (1986) suggest that the words chosen to describe conflict, are powerful and can result in a focus which narrows and may limit access to ideas and information.

Though the alternative dispute resolution movement has focused on the resolution of conflict, Folberg (1983) indicates that many speak of conflict 'management' as opposed to conflict 'resolution'. Though all of the issues in the dispute may not be resolved, conflict can be reduced

or managed. Taylor (1988) distinguishes between conflict management and conflict resolution. Resolution processes are designed to realign divergent viewpoints creating convergence, one party moves towards the other party's position or both move toward a middle position. Conflict management processes do not require the parties to give up their individual perceptions, but that they simply create coordinated agreements that can improve the situation. Conflict is not necessarily resolved, but it is managed.

Mediation can include both the resolution of conflict (possibly the ideal condition) or the management of conflict. Tripp (1985) advocates that mediation use a conflict management approach, in which conflict is used and managed, rather than a conflict resolution approach where conflict is necessarily resolved or stifled. When conflict situations are creatively managed and manipulated, they can lead to new insights for the participants. The goal, according to Tripp, is not to eradicate conflict completely, but to help disputants use it constructively and prevent it from being excessively disruptive.

Sarat (1988) suggests that mediation is practiced in different ways, different contexts, and by different mediators. Dispute processing techniques are not fixed and rigid, they are flexible and adaptive, Sarat suggests that disputes are constituted and transformed as they are processed. The disputants shape the dispute process and the

dispute process reshapes and remakes the disputes that they process, with the result that disputes are more often processed than resolved. Mediation becomes embedded in the move of scholars and practitioners to search out new ways to manage and resolve conflict.

The mediation literature locates mediation within an ever growing number of third-party interventions such as adjudication, arbitration, conciliation, facilitation, process consultation, Med/Arb (non-settlement in mediation leads to binding settlement in arbitration), factfinding, investigation, ombudsman, justice boards, special masters, friends of the court, counselling, therapy, inquisition, and adversary interventions (Sheppard, 1984). This literature is replete with inconsistencies regarding mediation's conflict orientation and problem-solving focus, whether it is a collaborative integrative process, or it is a competitive procedure based on compromise, or whether it more closely resembles court proceedings (Kressel & Pruitt, 1989).

Paradigmatic Shift

Burton and Sandole (1986) believe that a paradigm shift has occurred within thinking in the field of conflict resolution. They suggest that the shift has occurred within the last half of this century. This paradigmatic shift locates the source of conflict within the circumstances in

which people operate rather than with previous thinking in which the problem source is/was the person and her/his innate nature which needed to be controlled by authoritative measures and institutions. Previous thinking has been based on the unquestioned assumption about human nature, that conflict occurred because of man/woman's nature and needed to be dealt with through socialization of the individual. People could not be trusted to resolve their own problems. Conflict operated within a power-based, coercive, controlling paradigm. The function of institutions (legal systems) was to control members of society.

This paradigmatic shift makes the individual the focus of attention and shifts the settlement of conflict from authoritative controls to resolution by the parties themselves. Higgs (1986) concurs that a shift is in progress and indicates that the focus is moving away from the authoritarian structure of the family towards a more democratic structure where the focus is on the individual. This has made possible the beginning of the dispute resolution movement and a shift from formal adversarial judicial processes to less formal processes such as mediation.

Susskind and Ozawa (1983) suggest that mediation be used as a supplement to, rather than replacement for more traditional adversarial legal proceedings which discourage joint problem solving. The legal focus considers whether a

decision is legal, not whether it's wise. Mediation allows a consideration of the interests of all affected parties. Lande (1984) suggests that the adversarial process and the mediation process are two different paradigms within the traditional legal system. The adversarial system advocates competition while mediation advocates cooperation.

When mediation is located in the adversary tradition, it runs the risk of granting substantial decision-making authority to the mediator in the same way that attorneys maintain control of information and exchanges for their client's benefit. The adversarial perspective would relegate the parties decision making role to merely starting or stopping the process with the mediator dominating the process. He advocates using the parties' needs, interests, and values as the proper basis for decision-making.

Lande (1984) encourages this shift in thinking and concurs that mediation can be very different from authoritarian measures. He advocates that practitioners develop a new consensus on basic values, locating these in the participants' interests rather than the mediator's beliefs, biases. Mediation is a response to a shift in thinking, a paradigm shift that locates problem solving in the individual.

There is a difference of opinion among practitioners and theorists as to which problem-solving approaches can properly be called "mediation". Many authors consider

mediation a cooperative, win-win process while others suggest that mediation is based on a competitive win-lose model. Other models of mediation are related to the control exerted by the third party, these different models are described below.

Mediation as either Cooperation or Competition

A proliferation of third-party processes exist to manage and solve interpersonal conflict. The self-perpetuating and escalatory mechanisms of conflict increase the likelihood of engendering damaging, win-lose behaviors and outcomes, making it difficult for parties to shift their thinking towards a collaborative, win-win orientation, such as mediation (Kiely & Crary, 1986). Pruitt (1981a) indicates that one of mediation's most important aims is to encourage parties to accept a problem-solving approach and to move from a competitive focus.

Kiely and Crary (1986) Taylor (1988), Stomato and Jaffe (1991), Milne (1983), Folberg (1983), Sarat (1988) and Greenbaum (1986) consider mediation to be a collaborative problem solving process based on common interests and needs. These authors view mediation as a cooperative means of resolving conflict issues; the parties solve problems together and realize the mutual advantage of cooperation and mediation avoids the winner-loser syndrome. Greenbaum (1986) suggests that mediators are more concerned with

collaborative problem solving prospects for agreement than with specific outcomes. Keily and Crary (1986) indicate that mediation is not based on a compromise model as is arbitration, or a win/lose model as in court systems, but a win/win model which achieves a mutually satisfactory, joint solution and is the only formal process capable of achieving that end.

Murray (1986) finds two distinct conflict-related behavioral patterns within mediation and negotiation. The competitive model, which is driven by egocentric self-interest with a win-lose perspective, and the problem-solving approach, such as Fisher and Ury's (1981) principled negotiation, which is controlled by enlightened self-interest and a win-win view.

In direct contrast to the view that mediation is a cooperative venture, several theorists consider mediation a more traditional approach to conflict with a competitive, win-lose orientation. According to Wall (1981) mediation accepts a resource scarcity perspective, developing a compromise and concession building model. Potapchuk and Carlson (1987) devised a framework for conflict analysis in which, depending on the parties' position within specific variables, the intervenor can choose a type of intervention (conciliation, mediation or facilitation) that would best accommodate the conflict. The intervenor can either be a mediator utilizing distributive intervention processes, a

conciliator with diagnostic processes, or a facilitator using integrative techniques.

Potapchuk and Carlson's (1987) work locates mediation as an intervention distinct from problem solving, facilitation or conciliation. Mediation may require a distributive mode, in which no joint gains beyond simple agreement may exist and potential outcomes are viewed as win-lose. They suggest that this requires a more formal approach than the informality of collaborative problem-solving, suggesting that mediation is a more formal measure than conciliation, facilitation or problem-solving.

Keashly, Fisher, and Grant (1993) suggest that the underlying assumptions regarding the nature of conflict is the distinguishing factor between different conflict resolution interventions. Theorists have characterized conflict as either based on the perception of incompatible goals, interests, and values, considering these to be the objective elements (content-oriented); or based on misperceptions and misunderstandings between parties which are considered the subjective (relational-oriented) elements within the conflict.

Fisher and Keashly (1988), Keashly et al (1993), and Fisher (1983) draw a careful distinction between mediation and process consultation. Process-oriented approaches to problem solving such as third-party or process consultation appropriate a subjective emphasis, focusing on the

relationship between the parties, their feelings, attitudes and their perceptions, while, according to Fisher (1983), mediation focuses on the objective elements of conflict.

Keashly et al (1993) assume that the subjective focus will facilitate a more collaborative and integrative approach to problem solving. These theorists consider mediation to be a more traditional approach (though Bartoletti and Stark, 1991; Blades, 1984; Folberg, 1983; and Cramer & Schoeneman, 1985 consider mediation an alternative to the more traditional adversarial judicial approach).

There are numerous points of view in which mediation is located as either a cooperative, win-win problem solving approach to dispute resolution or as a competitive, win-lose approach. Though advocates of a clear separation of mediation from other processes such as process consultation find an apparent distinction based on the importance of 55 subjective, relational aspects and objective process-oriented tactics, to some the distinction is not so clear. The next section describes many of the models of mediation in which relational and content strategies are both necessary parts of the process.

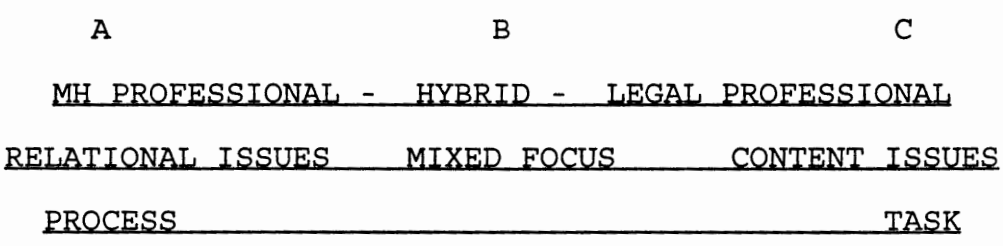
Models of Mediation Related to Relational and Content Strategies

Theorists have suggested that there are two dimensions of mediator strategies--the relational, process-oriented

strategies; and the task, content-oriented strategies. Girdner (1986) suggests two processes in family mediation--restructuring the family and negotiating agreement Both are developmental processes, with their emphasis stemming from the mediator's orientation as either a mental-health professional or a legal professional. Family mediation exists within a continuum between the practice of therapy (see A in figure 1), which is oriented toward the needs of the family, taking a relational focus, and the practice of law or labor (see C in figure 1), which is oriented toward negotiating a settlement and emphasizes the substantive (content) issues. Figure 1 shows the different disciplines and their focus in regard to relational and/or content issues. The area in the middle, B, represents mediation practices in which the processes of restructuring relationships and negotiating agreements are balanced, suggesting a mixing of the mental health discipline with the legal or labor focus.

Girdner (1986) contends that one of the barriers to a convergent practice of mediation is lack of a common language used by theorists and practitioners. Mediators come from different disciplines and use the language of their primary professional orientation. The hybrid mediator may be a co-mediation team of attorney and therapist, or those who have previous training in both disputing processes.

Figure 1: Girdner's Model of Family Mediation (in relation to a continuum of a relational, process; or a content, task focus)



Haynes (1985) describes a model of mediator strategies based on two dimensions--the partie's willingness to mediate and their level of ability. The partie's willingness to negotiate is used as an indicator of the need to utilize relational strategies which are designed to meet the emotional needs of the parties (see figure 1). The parties' capability to mediate is an indicator to the mediator to utilize a task focus which might include educating, providing technical assistance, or making suggestions (see figure 1). He suggests that the typology generated and the strategies developed are universally applicable to all mediation contexts. The mediator works as a process manager, balancing relational and task needs.

Landsberger (1955) conducted an analysis using Bales' theory of small groups in which the mediator activities oscillate between a task focus and socio-emotional functions. Pruitt (1981a) indicates two headings under

which mediation practices lie, process mediation and content mediation. Many of the activities listed under process mediation are designed to deal with emotional or relational issues while content mediation deals with the substantive issues as well as finalizing the agreement. Kochan and Jick (1978) describe contingent mediation strategies and non-contingent strategies. The contingent strategies are directive strategies around substantive issues while the noncontingent strategies are related to trust and confidence, searching for information, and allowing the parties to air their feelings, again the relational component.

Kressel (1972), and updated by Kressel and Pruitt (1985), develop three types of tactics within mediation--reflexive, contextual, and substantive. The reflexive activities are gaining entry, bonding, and diagnosis, while the contextual activities include communication facilitation and diffusion of anger. Reflexive and contextual tactics deal with the relational aspects in mediation. During the substantive interventions, the mediator deals directly with the issues in dispute.

Carnevale, Lim and Mclaughlin (1989) building on existing theory, conducted a multidimensional scaling study of mediator tactics related to Kressel and Pruitt's (1985) above scheme of tactics, and developed a three dimensional spatial configuration of mediation tactics. They found

substantive-reflexive tactics along the first dimension, affective-cognitive tactics along the second dimension, while the third dimension involves tactics along a forcing-facilitating continuum. Each dimension has an element which fits readily with either a relational focus or a content, task focus.

Third-Party Control

Mediation is closely related to other third-party problem solving processes and Murnighan (1986) uses the amount of power assigned to the third party to distinguish mediation from other processes. Murnighan situates mediation along a continuum of third party control (see figure 2), differentiating interventions or dispute resolution processes by the power of the party in the middle. Murnighan contrasts mediation with autocratic procedures and arbitration where the third party has outcome control with the implicit assumption of process control as well. In mediation there is limited power. The mediator is invited with the expectation that the situation will improve, and the mediator extends only process control. Numerous dispute resolution procedures lie between these two extreme positions (i.e. adjudication, arbitration, factfinding, mediation, process consultation, etc.).

Kerr (1954) locates mediation midway between conciliation where the parties manage the dispute with

little outside assistance and arbitration in which the third party makes the final decision (see figure 2). Mediation, according to Haynes (1981), is a process of managed problem-solving, and management of the process is the responsibility of the mediator.

Fisher (1983) indicates that mediation is at a midway point between process consultation and arbitration, where the role of the intermediary determines whether the intervenor controls the process as in consultation, controls the content and the process as in mediation, or the intervenor controls the content as in arbitration (see figure 2). In divorce mediation, according to Blades (1984), the mediator controls the process but not the substance of the dispute. Figure 2 shows Murnighan (1986) and Kerr's (1954) continuum of third party control and locates arbitration, mediation, conciliation, adjudication and process consultation within that continuum. The last line shows the relationship that Folberg suggests between process control and substance control, with the mediator controlling both process and substance of the dispute. The other process, arbitration, conciliation and process consultation are located within this continuum as well.

Figure 2: A continuum of Third Party Control

Continuum:

HIGH	THIRD PARTY CONTROL	LOW
ARBITRATION	MEDIATION	CONCILIATION
ADJUDICATION	MEDIATION	PROCESS CONSULT
SUBSTANCE CONTROL	PROCESS/SUBSTANCE	PROCESS CONTROL

Directive Mediator Versus Nondirective

Kiely and Crary (1986) find that although mediation, like other interventions, alters the power and social dynamics of relationships between the parties, the solution of a mediated dispute is arrived at by the disputants themselves. The third party's role is to create consensus. Mediation is considered more attractive than other more conventional dispute resolution mechanisms because it allows for more direct involvement of those most affected by decisions than most administrative, judicial and legislative processes. According to Susskind and Ozawa (1983) mediation is a flexible, informal procedure and, therefore, more adaptable to the specific needs of the parties.

Bush (1993) is concerned with the results of research (Bernard, Folger, Weingarten & Zumeta, 1984; Greatbatch & Dingwall, 1989) showing that mediator influence over the substance and terms of settlements is extensive. He suggests that mediators make judgments about how disputes should be settled and direct their interaction towards those

ends. Kaufman and Duncan (1992) indicate that mediators utilize persuasion to alter the parties' perceptions of choices and consequences, based on the mediator's need to promote a settlement, or other motives such as preference for one party over the other. Kolb (1981) found that mediators from one agency utilized "active" tactics to direct parties towards settlements, while mediators from another agency were more concerned with the process and more often left the substance of the dispute to the parties.

Several models of mediation are related to the concept of neutrality, which determines whether the mediator intervenes on behalf of one or more of the parties or whether the mediator remains neutral Burrell, Donohue & Allen, 1990; Smith, 1985; Kressel & Pruitt, 1985; Touval, 1985; Murnighan, 1986; Pruitt 1981b). This distinction between the different models is based on a mediator that is either an active mediator, utilizing an interventionist model as opposed to a neutral mediator using a facilitative approach to mediation (Bernard, Folger, Weingarten and Zumeta, 1984).

Blades (1984) speaks of the nondirective mediator who allows the parties to develop settlements based on their own perceptions of fairness in contrast with the very directive mediator, in which the mediator interjects her/his own sense of fairness in the decision-making process. There exists within the practices of mediation differing opinions as to

how much control the mediator needs to exert within the process. There are models of mediation which expect a directive mediator as well as models which call for a nondirective, noninteractive mediator.

The Academy of Family Mediators (AFM) standards states that a principle precept of mediation is self-determination, that decision-making authority rests with the parties (Grebe, 1992). Kelly (1983) places the techniques and interventions of mediation in a range from a nondirective, noninteractive stance (consistent with psychotherapeutic approaches) to a very directive and active approach. Raiffa (1983) points to a continuum of mediator roles from weak to strong; they range from the mediator assuming the role of convener or discussion leader, summarizing and articulating consensus, to a mediator helping implement agreements, giving approval to compromise agreements, suggesting alternatives, and devising and proposing compromises.

The Society of Professionals in Dispute Resolution (SPIDR) standards conclude that the third party will be impartial, yet includes a provision that the mediator must be satisfied that agreements will not impugn the integrity of the process. These combined expectations create a dichotomy of mediator positions, making it unclear just who controls the process (Grebe, 1992). Lande (1984) finds that the American Bar Association (ABA) Family Law Section's Standards of Practice for Divorce Mediators are inconsistent

with the principle of participant responsibility for decision making in that they specify responsibility to mediators and consulting attorneys leaving participants with relatively passive roles instead of retaining primary decision-making responsibility for themselves.

Greatbatch and Dingwall (1989) studied mediation in Britain and found a strategy used by divorce mediators labeled "selective facilitation". This strategy is used to steer parties in the particular direction chosen by the mediator. One of the central tenants of mediation is that the responsibility for outcomes is to remain in the hands of the parties. Mediation is extolled as a process which supports self-determination, yet the mediator can act in coercive ways supplanting that self-determination. Taylor (1988) states that coercive dispute techniques are undesirable in mediation, yet Kissinger's success and effectiveness in mediation was attributed to his highly directive and aggressive style as a mediator (Kochan, 1981).

Susskind and Ozawa (1983) indicate that the labor model of mediation assumes a passive, inactive style. The mediator does not take an interest in the outcome but assumes a passive role. Hiltrop (1985) suggests that a nondirective role is more effective in the early stages of (labor) mediation, but a directive role is called for during the final negotiations. Rubin (1981) suggests that nondirective strategies yield greater long-term

internalization of concessions made, and lead to long-term endurance of agreements. Laikeu, Culler, Pearson and Thoennes (1985) found in their study of divorce mediators that the mediators, rather than the parties, were responsible for generating most of the proposed solutions. Generating solutions by the mediator stresses the active role of mediators in option generation and proposing settlements.

The likelihood that a mediator will choose to use pressure tactics seems to increase under different circumstances. An increase occurs when the mediator's own interests or values are at stake (Rubin, 1981; Susskind & Ozawa, 1985), when the dispute entails high levels of hostility, (Hiltrop, 1989), when there are strong institutional pressures to avoid costs of adjudication (Vidmar, 1985) and when the mediator has more formal authority (Bercovitch, 1989; Wall & Rude, 1985). Bercovitch and Kressel and Pruitt (1989) find that such tactics lead to more settlements in international mediation than milder approaches which focus on facilitating communication and formulating issues.

The impact of mediator pressure tactics constructs a mixed picture. There exists proponents for both directive and nondirective mediation models with no consensus as to which model epitomizes an ideal in mediation, and their uses can be found to exemplify the different contexts in which

mediation is found. The mediation literature contains numerous conflicting expectations regarding this issue. Though mediation is presented as a process that enhances disputant participation, the use of active or directive tactics is acceptable by theorists and practitioners, even preferred under certain circumstances, and these tactics can undermine disputant participation.

How important is the concept of disputant participation in the mediation process, how much is disputant participation embedded in the definition of mediation, and can mediation be differentiated from other processes with regard to disputant participation (i.e. adjudication in which there is very little participation)? The question whether mediation encourages disputant participation constitutes a contradictory finding in the literature and points to the difficulty of determining which characteristics exist in the process of mediation, and what processes can properly be termed mediation.

CHAPTER III

EXPLICATION OF THE TERM MEDIATION

The purpose of this chapter is to explicate mediation using the numerous definitions of the term found throughout the literature. The literature differentiate mediation from other third-party process through definition and comparison. This study provides an explication of the term mediation which extends through the many contexts in which mediation is found to occur. Numerous lower-order concepts and issues (essential characteristics of mediation) and their relationships within the process are identified and contribute to an explication of the term mediation.

Explication by Definition

An explication of mediation begins with an investigation of the different conceptual meanings, operational definitions and differing names under which the concept has been studied (Chaffee, 1991). A first step in explication is to look at the various definitions of mediation and positions regarding its processes within the literature. Once a concept is formulated at a preliminary

level, an ensuing literature search is conducted for the purpose of determining the levels of definition.

Hempel (1952) describes three levels of definition--nominal definition, meaning analysis, and empirical definitions. According to Hempel, nominal definitions are generally other words arbitrarily assigned to stipulate the concept. Meaning analysis (also called "real" definition) contains the essential elements of the concept. The third level of definition is empirical definition, or the reduction of a concept to empirical referents (Chaffee, 1991). These levels are progressive in their practicality towards research.

The social science literature related to mediation lacks operational definitions of mediation or empirical studies determining the ability to measure and identify the concept 'mediation'. When different authors discuss mediation, there appears to be an agreement that if it is called mediation, it is mediation. There is some consistency in what is considered mediation, but often there are important issues that can be found to be described as important or essential to a definition of mediation, such as neutrality and a nondirective stance by the mediator, yet the literature contains contradictory expectations as to whether these characteristics are found in the process of mediation.

Wall (1993) and Sheppard (1984) suggest as a definition

"intervention by a third party who has control over the interaction of the parties but little control over the final outcomes" (Wall p. 186). A nominal definition for mediation is the term intervention. A "real" definition of mediation can be defined as third-party assistance to two or more disputing parties who are trying to reach agreement (Kerr, 1954; Pruitt, 1981a; Fisher, 1983; Pruitt & Kressel, 1985; Folberg & Milne, 1988; Kressel & Pruitt, 1989 Zartman & Touval, 1985). The "real" definition contains the essential characteristics of mediation.

There is consensus among researchers that mediation is a problem-solving process which utilizes an (presumably) impartial third-party with the goal of reaching an agreement (Moore, 1986; Pruitt, 1981a; Fisher, 1983; Wall, 1981; Bercovitch, 1989; Kressel & Pruitt 1989; Carnevale & Pegnetter, 1985; Albert & Howard, 1985; Potapchuk & Carlson, 1987; Milne & Folberg, 1988; Taylor, 1988; Kerr, 1954; Zartman & Touval, 1985; Landsberger, 1955; Pruitt & Kressel 1985; Volkema, 1986).

Potapchuk and Carlson (1987) relate a growing number of approaches available to third-party intervenors for the resolution of disputes and offer the following "real" definition of mediation: "The intervention into a dispute or negotiation by an acceptable third party who has no decision-making authority and is impartial to the issues being discussed to assist contending parties to voluntarily

reach a mutually acceptable settlement of issues in dispute" (p. 32).

Kaufman and Duncan (1992) infer that since mediation within the various contexts covers such a broad spectrum of operations, only wide definitions can encompass all of them. Folberg (1983) indicates that most authors assume an idiosyncratic definition of mediation; that is, their own particular definition. He suggests that the most generic way to look at mediation is to see it as a goal-directed, problem-solving, helping intervention.

Kelly (1983) calls mediation a "goal-focused, task-oriented, time-limited process" (p. 82). Folberg suggests that like law, counseling, therapy, or teaching, mediation does not lend itself to precise descriptive patterns. He considers the mediation process to be an alternative to violence, self-help, and litigation which emphasizes the parties' own responsibility for making decisions that affect their lives.

Just as mediation is defined differently by researchers, it is operationalized differently as well (when it is actually operationalized within the literature). Ross (1990) described a laboratory test of dispute mediation in which the two participants did not interact face to face, or with the mediator, but instead they negotiated in writing with each other. In the final session, the mediator brought them together for a 15-min. discussion in which the mediator

did not participate. This example of mediation operationalized as meeting with a nonparticipating mediator contradicts most definitions of mediation in which a third-party provides assistance to disputing parties (Kerr, 1954; Pruitt, 1981; Fisher, 1983; Pruitt & Kressel, 1985; Folberg & Milne, 1988; Kressel & Pruitt, 1989 Zartman & Touval, 1985).

Although practitioners mediate differently, Folberg (1983) suggests that all mediators should agree that mediation is a finite process which helps participants to enhance communication and maximize exploration of alternatives. Murnighan (1986) suggests in his "real" definition, that the structure of mediation is comprised of three elements--first, that two or more parties are experiencing difficulty agreeing, second, that an outside mediator is chosen by the parties, and third, that no final decision-making authority rests in the mediator (although judicial mediation certainly contains a degree of authority related to the mediator-judge).

An explication of the term mediation includes both nominal definitions and meaning analysis but lacks an empirical definition. As can be seen, the literature contains general definitions (nominal definitions) of what is considered mediation as well as descriptions of the essential elements or characteristics of mediation (meaning analysis or 'real' definitions), linguistic expressions and

their meanings. Mediation lacks empirical analysis (which according to Hempel, 1952, is not interested in linguistic expressions but with empirical phenomena and empirical fact).

In general, mediation consists of a third-party and two or more contending parties. The principles of mediation in the literature are that the parties are responsible for producing a mutually satisfactory and voluntary outcome with the assistance of a third-party who does not have decision-making authority and remains unbiased towards the parties. The process of mediation involves a skilled third-party who assists in problem-solving within a specific time frame and works towards the goal of resolution of the conflict. Only generic, broad definitions are able to encompass the wide range of uses of mediation in the literature.

Mediation Differentiated from other Processes

Much of the mediation literature takes pains to point out the different forms of third party interventions and provides definitions which help distinguish them from mediation. Mediated solutions are not imposed from above, as are arbitrated or adjudicated decisions, but are reached through the mutual consent of both parties to a dispute (Kressel & Pruitt, 1989). Currently, impartial third parties are used mainly in mediation and arbitration, while other third-party roles (conciliation, facilitation, ombuds,

fact finding) are either combinations or offshoots of these two, usually complimentary, processes (Greenbaum, 1986).

Fisher (1983) differentiates mediation from process consultation; mediation focuses on the substance of the dispute rather than the relationships between the disputants. Folberg (1983) reiterates that mediation is not a therapeutic process; it is more an interactive than intrapsychic process. It is task-directed and goal-oriented, focusing on resolution and results, not on the internalized causes of conflict behavior. It is not arbitration where parties authorize a third party and agree to a binding resolution. It is not the same as traditional negotiations of divorce, which use representatives (attorneys) and it is not conciliation, although people often use the two terms interchangeably (Folberg).

The different contexts in which mediation is found show the great variety of mediation practice that exists. The next section explores these contexts, showing a great diversity of processes with similarities and differences, yet each is called mediation. These contexts are explored and delineated with regard to their history and practice, with the purpose of further explication of the meaning(s) of mediation and its uses.

Explication by Mediation Context

There are numerous and growing arenas that are

utilizing different forms of mediation. Though the term mediation is used in each of these contexts, the process may vary greatly. Engram and Markowitz (1985) suggest that there are few universally accepted standards or practices. Every practitioner holds an individual vantage point, which leads to multiple perspectives "with the potential either to enrich the field or create a battleground" (p. 20).

The literature divides itself among the following mediation contexts: public sector (may refer to mediators paid by the courts, or the mediation of principles in the public sector), court-connected mediation (which sometimes includes divorce mediation), divorce mediation, international mediation, environmental mediation, community mediation, small claims (which may be included with public sector), and judicial or civil mediation. The following is a discussion of the various contexts in which mediation is found. Their characteristics and distinguishing features are described, as well as a comprehensive review of their history and practices.

Judicial Mediation

Judicial mediation occurs when a judge chooses to mediate an out of court settlement in a civil dispute (it is illegal in 48 states for judges to mediate criminal cases, Wall & Rude, 1989). Wall and Rude (1985) categorized three general strategies that judges use during judicial

mediation--logical, aggressive, or paternalistic. In 1983, the Supreme Court emphasized the importance of settlements (parties and/or their attorneys come to an agreement without taking the case to court) by stating that pursuit of settlement is one of the functions of pretrial negotiations.

Divorce Mediation

Milne (1983) in her article "State of the Art in Divorce Mediation", indicates that there are three primary divorce models, the therapeutic model, the structured model (which was created by J. O. Coogler, considered the father of divorce mediation) and the interdisciplinary model. The therapeutic model comes from the mental health field and includes a discussion of the marriage, the reasons for divorce, and an exploration of potential reconciliation while maintaining a focus on the future relationship between the couple. The therapeutic model emphasizes the present and the future, not the past (Kelly, 1983). A criticism leveled at the therapeutic model (by the legal community), is that the therapist may be practicing law without a license.

Milne (1983) differentiates mediation from psychotherapy, which explores past interactions in order to gain insights. Mediation's goal is not to resolve relational and psychological issues, but assist couples in reaching agreement on property, finances, custody &

visitation. Much of the divorce mediation literature addresses the distinguishing features of therapy and mediation, attempting to keep the two processes distinct, though acknowledging the difficulty of distinguishing mediation from therapy (Milne & Folberg, 1988; Butz, 1991; Dworkin, Jacob & Scott, 1991; Grebe, 1992; Kelly, 1983; Lemon, 1985).

The structured model comes from the legal field with attorney mediators who focus on finances and property as the primary issues. Criticism leveled at the structured models is that an attorney cannot represent two parties at the same time. The interdisciplinary model utilizes a team approach with the team consisting of an attorney and a therapist who are able to separate emotional issues from substantive issues. The team approach may rectify the problems related to the first two models (Milne, 1983).

With the development of no-fault divorce, which originated in California and was soon adopted by most other states (Blades, 1984), the courts have relegated responsibility for the decision to divorce to the parties themselves, rather than the courts, which has fostered a philosophy of mutual decision making. In 1939 California established court-connected conciliation services with the early focus to offer marriage counseling, aimed at reconciliation (Hale & Knecht, 1986; Milne & Folberg, 1988). As early as 1955 the service was providing a form of

conciliation similar to the present divorce mediation, although the term "mediation" was not used until 1974. According to Milne (1983) the goal is to provide couples with an effective means of resolving conflict while preserving integrity and developing new ways of being family members after divorce.

Folberg (1983) indicates four distributional questions that must be decided in divorce cases--marital property, spousal support, child support, and child custody and visitation. Many adherents of divorce mediation are academics and professionals whose primary concern is with the participants. Among the broader community there is the developing belief that the traditional justice system is not able to handle all disputes and may not be the most appropriate vehicle for resolution of some disputes. Bishop (1984) suggests that less formal ways of handling conflict (such as mediation) are perceived as socially beneficial and not merely as ways of relieving an overload on the courts.

Within the divorce mediation community there is some debate over whether mediation is best utilized in the public sector (connected to the courts) or the private sector utilizing private practice mediators (Henderson, 1986). Many states financially support public sector divorce mediation services through increased divorce filing fees. Unfortunately, within the literature, public sector mediation is alternatively and inconsistently described as

court-connected divorce mediation (Duryee, 1985; Hale & Knecht, 1986; Milne, 1983; Milne & Folberg, 1988), labor mediation involving municipal governments (Kochan & Jick, 1978; Carnevale & Pegnetter, 1985), or allocation of public resources (Susskind & Ozawa, 1985; Susskind & Ozawa, 1983). This is an example of one of many inconsistencies that exist within the mediation literature.

Milne and Folberg (1988) cite statistics from a 1983 study of the professional backgrounds of divorce mediators. Nearly 80% of all mediators hold a graduate degree, with social workers comprising 42% of the mediators in the private sector and 72% in the public sector. Marriage and family therapists, psychologists, and psychiatrists account for 36% of the mediators in the private sector and 18% in the public sector. Grouped together these mental health professionals accounted for 78% private sector and 90% of the public sector. Attorneys comprise 15% of the private practice mediators and 1% of the public sector. Other professionals include accountants, clergy, educators, financial planners, and guidance counselors and account for 6.5% of the private practice mediators and 9% of the public sector.

Labor mediation predates divorce mediation, however Bernard, Folger, Weingarten, and Zumeta (1984) believe that copying the labor mediation model does not reflect adequately the divorce situation. A labor mediator would

probably never ask the disputants in a contract negotiation to rethink an agreement, however, for a divorce mediator to request parties to reconsider is an accepted practice. A major differences between labor mediation and divorce mediation is described by Engram and Markowitz (1985)--labor mediators may have political preferences (pro-management or pro-labor) and they generally do not try to empower the parties or pay attention to power imbalances.

A comparison of divorce mediation with labor and international mediation suggests that divorce mediation while, concerned with the concept of neutrality of the mediator, also requires the mediator to accept responsibility for the fairness and equity of the settlement.

Mediating Public Disputes and Environmental Mediation

Susskind and Ozawa (1983) compare the techniques of labor mediation and mediation in international disputes to see which are more appropriate for use in public-sector resource allocation disputes. Conflicts over the allocation of public resources are normally handled by legislative, administrative and judicial bodies. This comparison was made through case studies of mediation utilized within the distribution of federal block-grant funds, land use, water disputes, and the rule-making process related to the

Environmental Protection Agency (EPA). Mediated negotiation is the term preferred by Susskind and Ozawa rather than mediation because they felt it emphasized the neutral intervenor and helped to distinguish this process from other third-party consensual dispute-resolution approaches (such as third-party consultation). The negotiated mediation procedure consists of arranging meetings, assisting in the exchange of information, extending proposals at the request of the parties, assisting parties in developing clear statements of interests, and proposing possible settlements (Susskind & Ozawa, 1983).

The key to mediated negotiation is the face-to-face dialogue among stakeholders assisted by a nonpartisan facilitator. Lake (1980) reiterates the need to "develop face-to-face opportunities for dialogue between disputants, and socialization, so that they are able to develop their own settlement, rather than have one imposed by the courts" (p.xiv). Mediation is attractive because of the weaknesses of traditional dispute-resolution mechanisms, allowing more direct involvement, rapid results, lower costs, and more adaptability to the parties' needs. It is seen as a supplement to the traditional administrative, legislative and judicial decision-making procedures for settling disputes of environmental or other public decisions. The strength of mediation is that it does create a clearly-stated public consensus which can be hard to ignore.

Susskind and Ozawa (1983) find that when comparing mediation with typical administrative and judicial processes, the outcome and process appear more fair, more efficient in representing the parties, and produce more stable agreements, though they conclude that it is difficult to generate convincing data.

According to Susskind and Ozawa (1983) the labor model (see section on Labor Mediation p.88) of mediation may be inappropriate for public and environmental mediation These disputes differ significantly in that there are multiple parties which need representation and can include diffuse, inarticulate, and hard-to-represent groups. Lake (1980) indicates that, unlike the two-party labor-management dispute process, equitable representation in environmental disputes pose a major challenge for mediators where there are multiple groups claiming to represent the same interests, yet have a different focus and objectives. In public-sector mediation there is the presumption that the more effort that is made to take into account all of the competing interests, the more stable the final agreement (Lake, 1980). The parties are generally one-time-only disputants, without a continuing relationship.

Susskind and Ozawa (1983) conclude that collective bargaining has provided the most-used model of mediation for the public sector or environmental mediation context, though not the most appropriate. A comparison with the labor model

finds, as a shortcoming, labor mediation's preoccupation with the process. In environmental mediation, the mediator needs to assume additional responsibilities, such as fairness, efficiency and stability of the agreement. In labor mediation the expectations and the procedure are institutionalized through experience and time. Labor mediation consists of well-defined issues, ongoing relationships, experienced negotiators, and a high interest in settling. The collective bargaining mediator takes on the role of guardian of the process with less need to serve as educator, since the experienced negotiator is well-informed about the issues.

Susskind and Ozawa (1985) submit that mediating public disputes is more akin to international mediation for the following reasons--the mediator maintains control over the proceedings and plays a more active role in the development of the terms of settlement, and generally maintains the power to offer inducements or threats if the parties refuse to participate. The mediator must be "sold" to the participants based his/her acceptability to the parties. There are few institutional agreements regarding the process of environmental mediation. The participants seldom understand the process, and there is usually no continuing relationship. The mediator may be a person of substantial power, Susskind and Ozawa (1983) describe a congressional representative, a known environmental advocate, who

volunteered and was accepted to mediate a situation which included the construction of a water-treatment facility, a dam, and a reservoir. His position allowed him to bring subtle and direct pressure on parties.

Environmental mediation includes intergovernmental policies involved in local disputes over dams, power plants, highways, shopping centers, factories and other incidents of policy implementation. These are political disputes which have technical elements. Local and national groups are locked in lengthy battles over the distributional impacts of policy decisions. Litigation permits interest groups to overcome ineffective public hearings by allowing them another access point to decision making, but it does not restore the sense of community.

Federal legislation passed in the early 1970s include the National Environmental Policy Act, the Clean Air Act and amendments, and the Clean Waters act and amendments. This legislation created policies, standards and guidelines with which federal agencies must comply, one of which is the procedural guidelines for public participation. The National Environmental Policy Act required that environmental impact statements be recorded for projects which received federal funds and which had significant impact on the environment. This legislation created "an unusual curb on government by the government" (Lake, 1980 p.3), and evolved into the practice of environmental law.

Public participation in decision making has primarily been achieved through public hearings, and many environmental groups feel that political decision making is corrupt, according to Lake (1980). The adversary process of litigation seeks to prove the other side wrong instead of generating a consensus that all parties can live with. The number of environmental conflicts has increased dramatically during the 1970s, yet the number of lawsuits during this time has not significantly increased. According to Susskind and Ozawa (1985), environmental mediators ought to accept responsibility for ensuring that the interests of parties not directly involved in the negotiations, but with a stake in the outcomes, are adequately represented and that agreements are fair, stable, and are interpreted as intended.

There is no defined model of public or environmental mediation. It exists as a complex, political, multi-party problem-solving process, utilizing a facilitator who acknowledges the need to take into consideration the interests of those who may not be represented, and the responsibility for the endurance and fairness of the agreement.

International Mediation

"Mediation is as common an occurrence in international politics as is conflict" (Zartman & Touval, 1985). The

literature on international mediation is contributed to more by scholars than by practitioners (Pruitt, 1981b; Touval, 1982; Zartman & Touval), which significantly differs from the literature on divorce or labor mediation. International mediation is embedded in power politics and cost-benefit calculations. Rubin (1981) and Bercovitch (1989) suggest that parties need to be sufficiently competitive to reach impasse and adequately cooperative to be able to benefit from mediation.

Touval (1982) indicates that a mediator (intermediary) intervenes in an international conflict with the purpose of attenuating or resolving the dispute. A necessary prerequisite is the acceptability of the intervenor to both sides. The acceptance of the mediator by the disputing parties is not necessarily determined by their perceptions of the mediator's neutrality (Zartman & Touval, 1985). Third parties are admissible only to the extent that they are thought to be capable of bringing about acceptable outcomes.

Bercovitch (1989) finds that relationships between nations in international politics generate three basic methods of conflict management--coercion and violence, negotiation, and the involvement of a third party (fact finding, good offices, and mediation). Touval (1982) states that the distinction between differing forms of third-party roles is the degree of involvement by the intermediary, and

considers mediation to be the most versatile role, which may subsume the other roles. Mediation is a peaceful form of conflict management and occurs under the following four conditions--long drawn out complex disputes, the parties own efforts at conflict management have reached an impasse, neither party wants further escalation of the dispute, and the parties are sufficiently cooperative towards breaking the stalemate.

Bercovitch (1989) systematically analyzed international disputes and found, based on pre-set criteria, 72 disputes from 1945 to 1984, of which 44 were mediated, some of which experienced more than one mediation effort, leading to a total of 210 official mediation efforts during that 39-year period. He found the relationship between the strategies used and the outcome of the dispute were interesting in that generally, the more active the strategy used by the mediators, the more effective they were in moving towards settlement.

Zartman and Touval (1985) suggest three roles that mediators play in international mediation, mediator as communicator, mediator as formulator, and mediator as manipulator (in which the mediator utilizes his/her position within the power structure, and other resources to move the parties into a particular agreement).

Stein (1981) suggests two structures of mediation based on the experiences of Henry Kissinger and President Jimmy

Carter in the Middle East. Kissinger depended on the "triad" as the basic bargaining structure. He maintained the pivotal position in the triad, based on his powerful political leverage and the ability to offer rewards or threats. His strategy included an incremental, partial-strategy structure, which over time drew concessions. Carter used a multilateral, comprehensive strategy which lumped all the major issues together to encourage across-the-board compromise.

Stein (1985) compares Jimmy Carter and Henry Kissinger as mediators in the middle east and found that both mediators were exceptionally skilled, motivated, persistent, powerful and wealthy, and the nations with which they were dealing highly valued their ongoing relationships with the United States. She found that although their bargaining structures were highly divergent, their strategies and tactics were more similar than dissimilar. Some characteristics shared by both mediators were maintaining absolute control of the agenda throughout the process, developing personal intimate relationships with Anwar el-Sadat, and the use of threats and warnings of adverse consequences to Israel should they block the agreement. Both mediators postponed intractable issues, and utilized ambiguous language during the process.

Rubin (1981) indicates that the mediator may be motivated by defense of her/his interests threatened by the

continued conflict, and/or have a desire to extend and increase influence, using mediation as a vehicle for establishing relations with one or both parties (possibly hoping to win their gratitude). Rubin indicates that Kissinger was a highly directive, even aggressive mediator who controlled events and imposed strategy. Straus (1981) indicates that Kissinger conducted "mediation-with-muscle" (p. 258).

There is debate among scholars (Touval, 1982) as to whether the personal characteristics of the international mediator (skills, wisdom, expertise, persuasiveness, and experience) or the possession of resources by the mediator (which enable the mediator, through pressures and incentives to induce concessions), is the most important aspect of the process. International mediation is a complex political process which utilizes a powerful, directive, third party, though not a neutral (Smith, 1985; Touval, 1985; Pruitt, 1981b), who intervenes diplomatically in an international conflict with the purpose of contributing toward its abatement or resolution.

Community Mediation

During the late 1960's and the early 1970's, studies and commissions began to surface and document difficulties within the judicial system (Volkema, 1987). Many courts were experiencing problems related to caseload growth,

lengthy delays, costs, procedures and participant discontent with the quality of justice. Volkema indicates a substantial growth in non-judicial approaches to settling criminal and civil disputes (which handle a broad range of cases, such as landlord-tenant, consumer-merchant, employer-employee, family, neighbor, marital, civil, criminal and juvenile disputes) during the late 1980's. Albert and Howard (1985) contribute several factors to the increase in growth of alternative dispute resolution (ADR) programs--the 1960's "rights explosion", an increase in the types of grievances for which legal remedies are sought, and the overcrowded courts (to which the first factors contribute).

Volkema found in 1987, that the average age of an alternative dispute resolution (ADR) program was six years. Dukes (1990) found over 700 community dispute resolution centers (while Pruitt, McGillicuddy, Welton & Fry, 1989, suggest over 250 dispute settlement centers, DCS, conducting more than 230,000 hearings per year) in the United States with names such as "community mediation", "neighborhood justice", or "community board". The difficulties of measuring the effects of mediation on caseloads, property destruction, quality of life, loss of productivity, etc., are not well known and have made it difficult for proponents to promote interest in development of community ADR's (Volkema).

The literature does suggest that disputes settled

through mediation are those that would not generally be heard in court, or would not be adequately discussed because of court restrictions on admissability of evidence. Dukes (1990) finds the research results both ambiguous and contradictory with very few definite conclusions about community dispute resolution's success. He indicates modest findings regarding the superiority of ADR programs relative to adjudication.

Albert and Howard (1985) conducted a study of several dispute resolution programs and found a high percentage of satisfaction among participants, and that the sense of telling their side and being listened to contributed to that satisfaction. Pruitt et al (1989) indicate that studies have found evidence of user satisfaction and high levels of compliance with the agreed-on settlements. They also found that disputant satisfaction is linked to perceptions of whether the mediator understood what the disputant said while Kressel and Pruitt (1989) conclude that satisfaction is related to whether the disputants feel that the underlying issues have been uncovered. Peachy (1989) considers the central task of community mediation to be encouraging the disputants to seek outcomes other than retribution.

Dispute resolution centers generally follow the model of mediation in which a neutral third party facilitates an agreement between disputing parties. ADR programs differ

considerably from one another, some have been created and administered by such diverse entities as churches, courts, social service agencies, and the general community (non-profits). Mediator training and qualifications vary as well, from highly experienced personnel to volunteers with minimal training. An assessment of a single program may not say much about the rest of the field (Albert & Howard, 1985).

Labor Mediation

In 1878, Maryland became the first state to pass a law providing for conciliation of labor disputes, Pennsylvania instituted mediation in 1883, and in 1886 New York set up the State Board of Arbitration with an amendment passed in 1887 empowering the board to mediate (Maggiolo, 1985). According to Maggiolo, labor representatives lobbied for 40 years for a separate federal department whose primary concern would be the welfare of wage earners. In 1913 the Department of Labor was created where the Secretary of Labor was given the power to act as mediator and appoint commissioners in labor disputes "whenever in his judgment the interests of industrial peace may require it to be done..." (p. 56), though it was not until 1914 that Congress provided funding for the salary and expenses of mediators.

After World War II, Congress established the Federal Mediation and Conciliation Service, separating it from the

Department of Labor and establishing it as a independent agency in order to maintain its neutrality (Maggiolo, 1985). Most Labor Mediation literature chooses to distinguish mediation from other forms of dispute resolution used in labor disputes such as arbitration, med-arb (mediation if unsuccessful is followed by arbitration), fact finding and conciliation. Douglas (1962) finds a blurring of the distinguishing difference between these processes.

Labor mediators do not generally need to evaluate the outcome of agreements, whereas divorce mediators feel some responsibility to the low-power party and may not endorse an agreement that is not equitable (Engram & Markowitz, 1985). The term empowerment is used throughout the mediation literature, yet finds no parallel in the labor field. Mediators help parties to construct contracts, legal documents, generally related to monetary ends, needed working knowledge of labor laws and practices. A labor mediator is satisfied with a contract regardless of the contents (Engram & Markowitz; Bernard, Folger, Weingarten & Zumeta, 1984).

In contrast to other mediation techniques, according to Engram and Markowitz (1985), the labor mediator does not establish ground rules. The parties establish ground rules, and the mediator may use pressure tactics and threats, or withhold concessions in order to reach agreements. Engram and Markowitz, when comparing divorce with labor mediation,

found that formal labor mediation consists of mediators who act as catalysts and offer the assistance of neutrals to management and labor disputes. They lack authority to impose solutions, and did not judge the merits of the agreements.

Cancio (1959) found that government intervention in labor relations has increased even though the collective bargaining system on the whole has worked well. The government has become an important partner. Kerr (1954) says that unskilled mediators can turn parties even more against each other and may actually increase the inclination to strike, encourage a strike (though some negotiations bargain under statutes which do not permit strikes), or obscure solutions. This may also occur when the mediator is skilled. She/he may assist the parties to fight as well as to retreat.

The sophisticated labor or management negotiator will more likely need help to fight gracefully under certain circumstances, than to retreat gracefully under the same circumstances. The mediator may be an unwitting party in the hands of skilled management or union negotiators. There are times that the introduction of mediation into a labor dispute serves to hoodwink the public or their membership into thinking that all is being done and that the parties want to settle peacefully when, actually, they are intent on warfare. The introduction of mediation enables leaders to

deceive those whom they represent.

Kolb (1981) found that in her study of mediators from both a state agency and a federal agency, the mediators from each group saw their roles in different terms. State mediators considered themselves to be "dealmakers", while the federal mediators see themselves as orchestrators. The state mediators believe that a successful outcome is directly related to their efforts to produce and construct the 'deal'. They rely on their expertise and knowledge of other related settlements, contractual issues and policy, the ingredients of a reasonable package, and their skills in explaining and persuading the parties to agree to the package as the key to settlement.

The Federal mediators, in contrast, seek settlement through the facilitation of the parties' activities with "only intermittent, well-timed injections of reality" (Kolb, 1981 p.4) or input from the mediator. They stressed the process by which the parties worked to reach agreement, preferring joint meetings, and used tactics that encouraged the parties to feel involved.

Kolb (1981) suggests several reasons for the difference in focus and structure between these two groups. The federal mediators are hired because of extensive mediation experience, receive intensive formal training, and have resources such as spacious offices, access to journals and government reports, while the state mediators received no

formal training, had no offices, minimal access to documents and journals, and their roles as mediators have historically been joined to that of arbiters. She concludes that on the basis of observations, and the explanations the mediators gave for their activities, the primary distinguishing factor between these two approaches is the role of the mediator.

Douglas (1962) finds that mediators, rather than implicating themselves or others in responsibility for the outcome of negotiations, use "the strike", "the compromise", "the economy" to justify the work that is done in the conference room. She contends that though mediators insist that the potential of a strike will help settle a dispute, mediators are called in before strikes as well as during strikes and that available strike figures do not support the idea that mediation reduces the national trend of striking. She says that mediators utilize their own form of determinism in order to reduce the responsibility they may have towards a settlement. Mediators are more directive in their behavior than they may care to publicize, they hope that parties will accept solutions as their own, not attributing them to the mediator. Mediators consider it important that they convince the parties that they are neutral.

Landsberger (1955) indicates that the mediator's role includes clarification, reassurance, cajolery, suggestions, or just sitting silently. Karim and Pegnetter (1983)

produce the following categories of potentially effective mediator activities--reduce hostility thereby improving the level of objectivity, enhance each party's understanding of the other side's position, enable the parties to manage conflict, facilitate exploration of possible solutions, affect the parties' perception of the cost of continued conflict, and make face-saving contributions. Labor mediation is a formally institutionalized form of dispute resolution between labor and management organizations, which utilizes a presumably neutral third-party, who may behave in a very active and directive manner during the negotiations.

Further exploration of the theoretical issues related to mediation found in the literature produces numerous concepts and notable issues associated with mediation. Within the found research, the following are lower order concepts and issues and are essential characteristics of mediation. These concepts and issues vary with mediation context. Those which appear to be primary to an understanding of mediation and its practice are described in the next chapter.

CHAPTER IV

LOWER-ORDER CONCEPTS AND ISSUES RELATED TO MEDIATION

The purpose of this chapter is to explore the numerous lower-order concepts and issues associated with mediation and show their relationships . Mediation literature is replete with numerous concepts, and issues. Many of the concepts related to mediation have intertwined, vague or multiple meanings. Most researchers allude to the different concepts, seldom defining or differentiating them. Several lower order concepts have been associated with mediation, such as caucus, empowerment, mandatory mediation, neutrality, and power. These concepts are essential characteristics within an explication of mediation and vary by context.

During the course of my literature review, I found the following concepts were mentioned most frequently, often listed as crucial or important to the practice of mediation, or appeared to contain contradictions regarding their uses. Though there are other concepts which were not explored, these stand out as the key issues, concepts and practices.

Caucus

A caucus refers to the practice of a mediator meeting privately with either of the parties in dispute. Kressel and Pruitt (1989) describe caucus as an important intervention aimed at improving the climate between disputants. Meeting separately with a disputant is a very common mediator maneuver (kressel, 1972; Pruitt, McGillicuddy, Welton & Fry (1989). Of all the tactics described in practitioner manuals, caucusing is possibly the most commonly suggested.

Though the use of caucus is widespread throughout mediation, little has been written on the actual mechanics involved in caucus (Moore, 1987). Kressel and Pruitt suggest that the primary value of caucus is an increase in problem-solving activities. The mediator could present the opposition's side while in caucus without the tension of their presence. Moore (1986) suggests that caucuses initiated early in the procedure help parties to vent emotions, develop procedures and identify issues. Caucus use later in the process may assist in identifying issues as well as generating alternatives, while caucuses during the final phases of mediation are usually related to breaking deadlocks and assessing proposals and settlements.

Keashly, Fisher and Grant (1993) conducted a study in which they compared mediation with consultation. Their use

of caucus or separating the parties was used exclusively through the simulation with the mediation group. The parties did not meet face to face. They justified this choice by citing the use of caucus as an accepted and preferred practice in labor mediation. Most theorists and practitioners do not advocate exclusive use of caucus, but argue that it be used in conjunction with face-to-face meetings. Hiltrop (1989) suggests that using caucus exclusively works well only in low-conflict conditions. When hostilities are high, mediators were more effective when they avoided caucus or combined it with joint meetings. The exclusive use of caucus may generate mistrust among the parties.

Kolb (1981) found that in her study of labor mediators, state mediators used a caucus format almost exclusively until the very end when an agreement was ready to be finalized. Of the two groups she studied, the state mediators met with the parties jointly 74% of the time, and the federal mediators met with the parties jointly 30% of the time. Pruitt et al. (1989) found in their study of community dispute centers that 65% of the mediation time was spent in joint sessions.

Though caucus is a commonly-used intervention in mediation, its usefulness is not shared by all. Some mediators reject the use of caucus based on the belief that joint problem solving is essential for developing a solution

and joint meetings help develop skills that can be used in future situations in which a mediator is not involved. Markowitz and Engram (1983) suggest that the use of caucus is more acceptable in labor mediation and may not be as useful in divorce situations.

Pruitt et al. (1989) found that direct hostility was lessened in caucus sessions, though indirect hostilities were not. The incidence of emotion-laden hostility was less frequent during caucus, as the adversary was not there to incite emotional outbursts and the disputants tended to praise themselves and criticize their adversary during the caucus. Pruitt et al caution that the mediators be careful not to be misled by what occurs in a caucus.

Saving Face as a Mediator Strategy

Kressel and Pruitt (1989), and Markowitz and Engram (1983) consider an face-saving to be an important mediator function in some contexts. The mediator can take pressure off parties by making proposals that help parties move off extreme positions. Mediator suggested proposals allow the mediator to accept responsibility for unappetizing ideas, and enables parties to make a graceful retreat from an entrenched position. Carnevale, Lim and McLaughlin (1989) found that the face-saving strategy was positively associated with outcomes under certain conditions. Hiltrop (1989) also found face-saving technique in which mediator

made suggestions for the parties to take back to their constituencies.

Pruitt and Johnson (1970) studied face-saving as an aid to negotiations in mediated disputes. Many negotiators consider concessions a sign of weakness, but if the mediator suggests a concession and it appears reasonable and fair, the party can accept the suggestion and save face with him/herself and with any constituents. Zartman and Touval (1985) suggest that parties enter into mediation in the hope that the third party will help reduce some of the risks inherent in concession making.

Empowerment

Empowerment is defined as giving assistance to one of the parties so that both parties have equally valued input into the decision-making process of mediation (Markowitz & Engram, 1983). Harrington and Merry (1988) suggest that in community mediation, the process of consensual dispute settlement is one which empowers individuals, providing greater control over their lives and teaching them techniques they can apply to other situations. Salem and Davis (1984) indicate that mediation is an empowering process based on its openness.

There is powerful debate within the mediation community regarding the appropriate use of empowerment. The term empowerment is used throughout the mediation literature,

though not generally in labor mediation. Some divorce mediators believe that the concept of empowerment is dangerous, charged with ethical questions, and should never be used.

Markowitz and Engram (1983) disagree. They believe that such a strict interpretation of ethics only copies the labor mediation model and does not reflect the divorce situation. The debate includes the concept of neutrality, in which a mediator may lose impartiality when assisting either party, or while attempting to empower the weaker party. Markowitz and Engram believe that the idea of empowerment is consistent with maintaining the ethics of neutrality if the mediator maintains awareness of the consequences of empowerment techniques in terms of possible harm to all concerned. They endow the mediator with responsibility for the process, neutrality, empowerment and power balancing.

Cobb (1993) suggests that ADR programs and their advocates use the benefits of empowerment in promoting mediation. The roots of empowerment are in the therapy-related model of mediation, coming from the fields of counseling and social work. Mediation promotes the idea that empowerment leads to social change, allowing the disenfranchised segments of the population to gain control over their lives, and is used to rationalize the development of this informal form of dispute resolution. The support

for empowerment rests on the assumption that if individuals are empowered, then the community will be empowered. She indicates that research on empowerment is tied to disputant satisfaction and the reduction in conflicts and concludes that the absence of conflict does not indicate the presence of justice.

Empowerment is consistently cited as a major goal of mediation despite the absence of research or definition. It is consistently found in the literature adjacent to the concept of neutrality. Cobb (1983) found that mediators, in describing how they empower, recount three practices--the balancing of power, control of the process, and neutrality. In controlling the process, mediators manage the process but not the content of the dispute (controlling content is considered disempowering to the parties because it takes control of the disputed issues out of their hands).

Cobb defines empowerment as a set of discursive practices that "enhance the participation of disputants" (p. 250). She finds that the concept of empowerment is vague throughout the literature, seldom defined and sorely related to theory or research. Despite the lack of definition, there remains significant consensus within that literature regarding its value, particularly in the divorce and community mediation contexts.

Mandatory Mediation Versus Voluntary Mediation

One of the central tenets of mediation is that participation in mediation is voluntary, yet with the advent of court-affiliated mediation programs, participants are now being ordered by courts to participate in mediation. Tripp (1985) suggests that voluntary participation in mediation is one of the major principles of mediation, suggesting that disputing parties cannot be forced to participate. Duryee (1985) finds that there is no longer any question in California and many other states regarding the acceptance of mandatory mediation. She suggests that either mandatory mediation is not true mediation, or mediation is not truly voluntary. Duryee expresses concern with the possibility that mediation has the capacity to interfere with an individuals' rights of access to legal process.

Cramer and Schoeneman (1985) conclude that no court order can force someone to mediate. Courts can force exposure to mediation (no requirement that an agreement be reached). They also suggest that voluntary mediation is advantaged over mandatory mediation because the parties may not experience as much resistance to the mediation process in circumstances that are voluntary.

Harrington and Merry (1988) found in their research that community mediation centers embrace the concept of voluntary participation in mediation by the parties, yet these programs do not view referrals from police,

prosecutors, and judges as intrinsically coercive as long as the parties consent to participate. While mandatory mediation may require disputants to attempt mediation, the "process" itself is described as consensual and noncoercive. They suggest that the meaning of the term consent has been redefined from a voluntary decision to participate in the mediation process and has come to mean that parties participate in a consensual decision-making process where participation has been mandated. Consent is embedded in the interaction and decision-making, and not necessarily at the point of referral.

Roehl and Cook (1985) found that despite espoused philosophies and written statements from mediation programs, and that though the process of mediation is voluntary, the practice of 'intake coercion' (mandatory referral from courts to participate in mediation) is widespread, found strongest in court referrals related to possible prosecution and weakest in nonjustice related situations.

Folberg and Milne (1988) wonder if mediation is experiencing a transformation from a noncoercive, voluntary process into a coercive mandated procedure. The proponents of mandatory mediation argue that no one is compelled to use mediation as it is imposed as a precondition for those who cannot resolve their own dispute and request the court to intercede. Folberg and Milne show concern and suggest that the courts might mandate the provision of informational

programs about mediation and its benefits rather than requiring parties to participate without their consent.

McEwen and Milburn (1993) find that pressured entry or coercion into mediation is not the same as coercion within the process mediation. The circumstances in which disputes develop discourages disputants from entering mediation spontaneously or voluntarily because parties are focusing on goals of retribution and vindication. They suggest that mediators need to drop their naivete and confront the issue of balancing societal, collective interests, with individual choice.

Lind (1992) points out the historical practice of compulsory mediation in early international mediation, establishing, in his view, the legitimacy of compulsory mediation, and indicates that voluntariness may be as much an illusion as reality. The concept of compulsory mediation points to an important issue in mediation, whether forcing parties to participate violates the principle that mediation is a voluntary process. The mediation literature addresses many issues which are contradictory in nature with differing opinions as to their acceptance in the practice of mediation. These contradictions produce disparate processes which are labeled mediation yet may be very different in nature and expectations.

The Neutral Mediator

Neutrality in mediation is a central issue in the practice of mediation. "An overriding concern of practicing mediators is the ability to demonstrate freedom from bias" (Fuller, Kimsey & McKinney, 1992 p. 187). Terms describing this aspect of mediation include impartiality, objectivity and neutrality. An important concept in mediation, neutrality is noted consistently throughout the literature, yet it is seldom defined with any consistency and is generally found without definition or explanation.

According to Leitch (1987) neutrality means balance. The mediator is not a proponent of either party but supports the final agreement. Dworkin, Jacob, and Scott (1991) suggest that neutrality can be defined in two ways, either as keeping ones values, bias, or emotions from interfering with the process, or as maintaining equidistance between the parties. Feer (1992) calls equidistance a practice which facilitates communication and participation. By using empathy and listening, the mediator maintains equal attention to either party.

Engram and Markowitz (1985) suggest that neutrality is interpreted by labor mediators to mean no tampering with or changes to the inherent power of the parties by the mediator. Harrington and Merry (1988) found that community mediation defines consensual justice in terms of neutrality and detachment by the third party. The mediators they

studied view neutrality as the primary symbol of their practice and interpreted neutrality as maintaining a detached stance and empathy.

Impartiality is the first responsibility that mediators have to disputing parties, according to ethical standards set by the Society of Professionals in Dispute Resolution (SPIDR) (Fuller, Kimsey & Mckinney, 1992). Theorists (Blake Shepard & Mouton, 1964; Albert & Howard, 1985; Fisher, 1983; Lind, 1992; Tripp, 1985; Karim & Pegnetter, 1983) suggest that the aim of the mediator is to achieve effective neutrality, projecting a neutral stance. They suggest the mediator is unbiased, impartial, disinterested and objective. Slaikeu, Culler, Pearson and Thoennes (1985) studied mediator behaviors and found that 81% of mediator statements were presented in either neutral or positive tones. They suggest that mediators do play a key role as neutrals by addressing both parties in neutral terms.

Kolb (1985) indicates that mediators create an impression of neutrality through their behaviors. Blades (1984) suggests that the appearance of neutrality is as important as actual neutrality, suggesting the mediator is utilizing impression management. Salem (1984) found that when mediating with a group which espoused a Nazi philosophy, his colleagues questioned the ability to achieve or maintain impartiality. In Kolb's dramaturgical investigation of mediation, mediators developed an

impression of intimacy and friendship, creating a sense of alignment with the parties which serves to project the impression of neutrality. Tripp's (1985) experience with an Employees Assistance program acknowledges that all people have biases of some kind. Each mediator needs to be aware of, and neutralize, their personal biases as completely as possible while participating in mediation, creating a nonjudgmental climate.

Mediators carry their personal and professional biases, which Haynes (1981) indicates influences the outcome of mediated settlements. Greatbatch and Dingwall (1989) find that since neutrality in a situation of inequality may allow one party to exploit the other, mediators use techniques that enhance the power of the weaker party. The mediator manages the interaction in such a way that the parties will feel that the mediator has been neutral. Haynes (1981) argues that neutrality is impossible in divorce mediation. Mediators in international conflict are far from impartial and can still be effective. Smith (1985), Touval (1985), and Zartman and Touval (1985) find that the acceptability of a mediator is not determined by perceptions of the mediator's impartiality.

Susskind and Ozawa (1983) assert that the mediator needs to be perceived as impartial, but this claim of neutrality is misleading. Mediators shape the mediation process to influence the outcome. The claim of mediator

impartiality makes mediation attractive to disputants. Susskind and Ozawa suggest that though the mediator maintains interest in the mediation process, he\she must remain neutral to the outcome. Rehmus (1965) maintains that the claim of neutrality made by mediators preserves his/her acceptability, while at the same time it shields him/her from responsibility for the outcome. Silbey (1993) suggests that mediators are not neutral either to the process, to the parties, or to their own values Mediators utilize neutrality as linguistic device to justify their activities and promote their practice.

Davis and Salem (1984), Marshal (1990), as well as Menzel (1991), claim the process of mediation is neutral or impartial. Neutrality is a key principle influencing the practice of mediation. While the issue of mediator neutrality is central to mediation practice, there is surprisingly little relevant research. Much of the research and many of the articles related to mediation theory or practice suggest that there exists a neutral third party, yet there is no consensus as to what that might mean.

The concept of neutrality is complex. While it is clearly espoused by practitioners and scholars, it remains unclear in practice and theory. Most of the literature on mediation assumes or infers neutrality yet does not establish an explicit definition of the concept (Rifkin, Millen & Cobb, 1991; Fuller, Kimsey & Mckinney, 1992). The

perception of neutrality is key to mediation, yet the appearance of neutrality is considered as important as actual neutrality. Mediators are instructed to neutralize their biases and are found to use neutral tones. The interventionist and neutralist models of mediation point to the issue of neutrality in unequal situations. Though neutrality remains central to mediation it practice and use is not clearly delineated in the literature. The next section discusses power in mediation, followed by a section which outlines several theories of mediation related to power and neutrality.

Power in Mediation

"Mediated settlements between unequals are unequal" (Merry 1989 p. 84). Research on power in the mediation process concludes that agreements between disputants with unequal power can result in inequitable settlements (Mayer, 1987; Davis & Salem 1984; Haynes, 1988; Parker, 1991; Pruitt, 1981; Leitch, 1987; and Amundson, 1991). Haynes suggests that the mediator must balance power, because the more equal the power of the disputants, the more likely they are to cooperate in arriving at solutions that result in more equal outcomes. Recognizing power relationships between parties and what to do about them is one of the most difficult challenges in the practice of mediation (Haynes, 1988). Hocker and Wilmot (1985) suggest that power is

difficult to measure.

What is meant by power? The literature locates power with the disputants, with the mediator and with the process. Haynes (1988), in the context of disputant power, uses influence interchangeably with power, believing that power is derived from an ability to influence the actions of others, while Hocker and Wilmot (1985) see influence as necessary to the use of power in a conflict situation. Davis and Salem (1984) define power as the ability to influence or control others. Haynes defines power as control of, or access to, emotional, economic and physical resources desired by the other person. There is general agreement that one of the duties of the mediator is to utilize tactics or interventions that will attempt to sustain a greater balance in power between disputants (Pruitt 1981, Mayer 1987, Marshall 1990, Haynes 1988, & Parker 1991), though Bercovitch (1989) argues that in international mediation, power and influence are at the heart of successful mediation.

Another aspect of power in mediation is the larger context of social power in which legal scholars are concerned with the potential of mediation for violating the rights of citizens, and the potential for mediation to act as second-class justice. Mediation is considered a viable and less costly alternative to adjudication in civil and family court cases. There is fear that mediation may limit

access to litigation through power disparity and coercion (Roehl & Cook, 1985; Marshall, 1990). Power imbalances inevitably exist in mediation and can have a negative impact on the process as well as settlement. Roehl and Cook as well as Marshall suggest that in extreme cases mediators should discontinue mediation rather than allowing uninformed or intimidated parties to agree to settlements that may be unrealistic or unfair.

Kressel and Pruitt (1989) find contradictions among studies that indicate mediation creates a barrier for the less powerful by exposing them to intimidation and coercion or depriving them of the rights and protection associated with adjudication. In divorce mediation, where the question is mainly raised, Kressel and Pruitt find that evidence exists both for and against the notion that women, typically the less powerful economically, are disadvantaged. Roehl and Cook (1985) suggest that power disparity between parties is a serious concern, yet they find little research conducted regarding its effects. Pruitt, Mcgillicuddy, Welton and Fry (1989) found that the disputant problem solving was encouraged when mediators had the power to arbitrate if mediation failed. Disputants were motivated to impress and follow a more powerful mediator.

Mediator power can take a number of forms--authority over the disputants, the capacity to provide rewards, or the capacity to threaten punishment. Sheppard (1984) found that

third parties with authority over disputants were especially likely to identify solutions for them. Wall and Rude (1985) found that judges frequently adopt strong-arm tactics that would be unacceptable in the hands of less powerful mediators. Fisher's (1981) suggestion that mediators need to be totally unbiased and powerless may be an ideal, yet, according to Sheppard, mediator power has some decided benefits.

Power in the context of mediation is again found to be a complex concept with its dangers and its benefits. The literature finds it a valuable concept which certainly exists in practice. The inconsistencies within the literature as to its usefulness leaves the need to deal with power in the hands of each practitioner, based on her\his values, as well as the context in which the mediation occurs.

Models of Mediation Related to Power and Neutrality

Bernard, Folger, Weingarten and Zumeta (1984) place mediation philosophy at or between two extremes, the neutralist and the interventionist. The interventionist is concerned with particular outcomes related to power imbalances between parties and fairness. The interventionist will work against a consensual agreement if they feel it is unfair to one of the parties. The neutralist will allow the parties to come to any agreement

that is consensual.

The mediator must choose between acting as either a neutral, a proponent of a just settlement, a proponent of the weak party, or some blend of these positions. According to Bernard et al (1984), this difference can be based on perception of the inevitability of conflict, whether the mediator believes that conflict is inevitable and continuing relationships need stability and therefore consensus is important to that continuation, or whether the mediator believes that conflict is related to unequal power and the weak need protection.

Smith (1985), Kressel and Pruitt (1985), and Touval (1985), Murnighan (1986), and Pruitt (1981b) have each delineated models of mediation in which two systems exist. Though these five theorists describe their work with different terminology, there are similar distinctions between their two systems, distinctions based on power and neutrality. Smith describes the difference between "traditional" mediation and "international" mediation. Traditional mediation is drawn from models of labor and divorce mediation where the mediator is unknown to the participants and mediator neutrality is stressed. In international mediation, the mediating nations' power within the international community plays an important part in the acceptability and success of the mediation without regard to neutrality.

Kressel and Pruitt (1985) suggest a distinction between "emergent" mediation and "contractual" mediation where the emergent mediator may intervene without invitation, may have considerable power over the parties (such as manager over subordinates) and neutrality is mitigated by power. In contractual mediation, the mediator is a neutral outsider hired by the parties. Touval (1985) distinguishes between "political" and "apolitical" systems. In apolitical mediation, the mediator is invited and paid by the parties to help them resolve the dispute with no long-term relationship or interdependencies with the mediator. In political systems the mediators often interject themselves in the dispute, have a stake in the outcome and are not impartial.

Murnighan (1986) differentiates between "mediation" and "intravention" where the intravenor is frequently a member of the same system as the disputants and has considerably more power. Mediation occurs when an outside party is chosen rather than choosing to intervene and has no final decision making power. Pruitt (1981b) describes traditional and nontraditional mediation where the distinction lies with the disinterest of the traditional mediator in the outcome. Kissinger, when mediating in the Middle East was a powerful nondisinterested mediator. These five works have primary applications in the international and organizational settings. Carnevale (1986) indicates that the development

of patterns of mediation that are applicable across the various contexts in which these models are derived demonstrates that different mediation contexts have characteristics in common with one another. The integration of these similar works draws together research on mediation in a variety of contexts and though broadening the definition of mediation, shows the numerous applications of mediation in the literature.

Relationships of Concepts Within Mediation Contexts

Mediation as found in the different contexts is a varied intervention with some similarities in these contexts and some differences. How do the different contexts of mediation differ with regard to the concepts and issues discussed? Using several continuum regarding questions about mediation in the different contexts I have attempted to show how these contexts differ with the use of caucus, face-saving, empowerment, mandatory mediation, directive mediator tactics, a politically powerful mediator, and neutrality. Included in this discussion are some additional issues in mediation--whether the dispute is between two parties or multiple parties and whether the mediator needs to have substantive knowledge regarding the dispute. The different contexts of mediation are indicated along each continuum, showing where they generally lie in regard to the question.

Figure 3: Lower-Order Concepts and Their Relationships within Mediation Contexts.

THE USE OF CAUCUS IN MEDIATION

Continuum: **High Caucus Use** ——— **Low Caucus Use**

Context of Mediation:

International - xxx

Environmental- xxx

Labor - xxx

Divorce - xxxxxxxxxxxxxxxxx

Community - xxxxxxxxxxxxxxxxx

FACE-SAVING TECHNIQUE

Continuum: **High Use of Face-Saving** ——— **Low Use**

Context of Mediation:

International - xxx

Environmental- xxxxxxxxxxxxxxxxx

Labor - xxx

Divorce - xxxxxxxxxxxxxxxxx

Community - xxx

IMPORTANCE OF EMPOWERMENT IN MEDIATION

Continuum: High Importance Low Importance

Context of Mediation:

International - xxx

Environmental- xxx

Labor - xxx

Divorce - xxx

Community - xxx

MANDATORY MEDIATION

Continuum: Mandatory Mediation - Non-Mandatory

Context of Mediation:

International - xxx

Environmental- xxxxxxxxxxxxxxxxx

Labor - xxx

Divorce - xxxxxxxxxxxxxxxxx

Community - xxx

NEUTRALITY IN MEDIATION

Continuum: Neutral Mediator Nonneutral

Context of Mediation:

International - xxx

Environmental- xxxxxxxxxxxxxxxxx

Labor - xxx

Divorce - xxxxxxxxxxxxxxxxx

Community - xxx

POLITICALLY POWERFUL MEDIATOR

Continuum: Politically powerful mediator - Less powerful

Context of Mediation:

International - xxx

Environmental- xxx

Labor - xxx

Divorce - xxx

Community - xxx

DIRECTIVE MEDIATION TACTICS

Continuum: Directive Mediator - Non-Directive

Context of Mediation:

International - xxx

Environmental- xxxxxxxxxxxxxxxxx

Labor - xxx

Divorce - xxxxxxxxxxxxxxxxx

Community - xxx

TWO OR MORE PARTIES

Continuum: Two parties Multiple parties

Context of Mediation:

International - xxxxxxxxxxxxxxxxx

Environmental- xxxxxxxxxxxxxxxxx

Labor - xxx

Divorce - xxx

Community - xxx

SUBSTANTIVE KNOWLEDGE BY THE MEDIATOR

Continuum: **Substantive Knowledge - No Substantive knowledge**

Context of Mediation:

International - xxx

Environmental- xxx

Labor - xxx

Divorce - xxx

Community - xxx

A number of other concepts and issues are explored next. These apply to mediation across contexts and contribute to an explication of mediation related to lower order concepts and issues.

Ethics in Mediation

The term ethics is consistently associated with mediation throughout the literature. Theorists generally discuss ethics related to the development of ethical standards for the profession of mediation (Baker-Jackson, Bergman, Ferrick, Housepian, Garcia & Hulbert, 1985; Schneider, 1985; Bishop, 1984), within a discussion of ethical theory (Grebe, 1992; Gibson, 1989; Lax & Sebenius, 1986), or in relation to specific issues such as neutrality (Engram & Markowitz, 1985; Honeyman, 1986; Bernard, Folger, Weingarten & Zumeta, 1984), fairness (Dworkin & London, 1989), confidentiality (McIsaac, 1985), and power (Lax &

Sebenius; Engram & Markowitz; Dworkin, Jacob & Scott, 1991). Grebe indicates that ethics are involved in situations where one is required to make a moral decision, as distinct from a legal decision--when we need to decide what we "ought" to do.

Gibson (1989) indicates confusion exists in discussions about ethics. Key ethical terms are used by practitioners and theorists with the presumption that their uses are universally evident and accepted. Terms are used in a broad and vague way, assuming others will know what is meant. Their use within the literature by practitioners and theorists assumes that their meanings are universal, yet no theoretical grounding is found for justification, other than an intuitive sense of right and wrong. An example of this is found in Engram and Markowitz (1985), in which they presume "good labor mediators can ethically dance around the issue of confidential disclosures, since good labor negotiators expect them to" (p. 26). This claim needs to be underscored by ethical theory. It may be the case that, in some circumstances, good labor mediators cannot "dance around" confidentiality.

Engram and Markowitz (1985) suggest that, in divorce mediation, the responsibility of creating, as well as of upholding, ethical standards falls on the individual practitioner rather than on the profession as a whole. Schneider (1985) indicates that the reason a profession

needs a written code of ethics is to provide a public record of their commitment to social welfare, maintaining the confidence of the community. When one speaks of individuals' rights, what does one mean precisely? Is it unethical to coerce clients to continue against their interests? Issues in mediation such as empowerment, confidentiality, and impartiality are generally discussed in seclusion from any underlying ethical assumptions (Gibson, 1989). When there exists disparity in the parties' levels of power, a mediator is tempted to coach the weaker party. The ethical question is whether that sort of intervention is acceptable or advisable.

Mediation Goals

Folberg (1983) indicates that within mediation, the "goal is to help parties resolve their dispute and reduce the conflict between them" (p. 8). Kelly (1983) assumes that "all mediators generally agree that the primary goal of...mediation is a comprehensive settlement of the issues" (p. 35). Kelly and Gibson (1989) state that the explicit goal of divorce mediation is a negotiated settlement of the issues which is agreeable to both parties as well as mutually advantageous.

Goldberg, Green, and Sander (1985) suggest that a debate exists within the mediation field: whether the goal of mediation is to reach an agreement at any price, or

whether the mediator must accept responsibility for fairness. Lemon (1985) and Taylor (1988) indicate that a successful mediation has a good outcome, but it is not essential to reach an agreement. Goals might be to reduce or manage conflict as well as to make appropriate decisions.

Blades (1984) considers an agreement the ultimate goal of mediation, with personal growth as a secondary goal. She suggests that couples can learn to avoid past mistakes and to cooperate in future interactions. Menkel-Meadow (1993) suggests that for many, the transformative aspects of mediation are a primary goal of the process. She indicates the realizing of this goal is done through the development of empathy between the disputants. "A lasting agreement will simply not occur unless the parties understand what each is trying to accomplish" (p. 323). Some theorists suggest that an agreement is the goal of mediation while others see a number of other possible goals, such as personal growth, skills, educating the parties, and managing conflict, suggesting a values-versus-outcomes approach to mediation goals.

Dukes (1990), referring to mediation in community disputes, suggests a number of goals--individual satisfaction, individual autonomy, social control, social justice, social solidarity, personal transformation, and administrative economy. Harrington and Merry's (1988) ethnographic study of community mediation programs found

that three visions of community mediation were (a) the delivery of dispute resolution services, (b) social transformation, and (c) personal growth. According to Kelly (1983), increased self reliance, confidence and improved communication, though not a primary goal, are seen as effects of the process.

Theorists disagree as to a single specific goal of mediation, with a number of opinions and consequently a number of goals associated with mediation. Goals range from a final agreement and individual growth and empowerment to the introduction of skills that the parties can subsequently use in other areas of their lives. The most commonly accepted goal of mediation is to reach an equitable agreement during the interaction.

Success in Mediation

Settlement of the dispute is the most often-stated goal of mediation. Studies often use settlement (Kolb, 1983) of mediation, meaning the dispute was finalized in mediation, as a variable in research, operationalizing success as a settlement. In Donohue, Allen and Burrell's (1985) development of a mediation coding system, the successful mediator was one who achieved an agreement between the disputants.

Kochan (1981) equates the primary measure of mediation effectiveness with whether the process engenders a

settlement. This stress on settlement concerns Kressel and Pruitt (1989). High expectations of mediators to achieve settlements under any conditions, "settlement mania" (p. 406) can be an occupational hazard of the profession. Harrington and Merry (1988) question the use of high measures of satisfaction reported in evaluations of community mediation as indicators of the success of community mediation.

From a feminist perspective, Leitch (1987) questions the equating of an agreement with success. She argues that mediated agreements may serve to perpetuate gender-based inequities. Though success in mediation is associated with the parties reaching agreement, there are those who are concerned with that practice.

Standards of Practice

There is much discussion in the literature regarding standards of practice in mediation. Researchers agree that mediation is either a profession, striving to become one, or on the verge of becoming a profession in its own right (Benjamin, 1990; Rehmus, 1965; Dworkin, Jacob, & Scott, 1991; and Grebe, 1992). With the conception of a profession come professional standards and considerations.

In professional ethics, the standards expected of the profession's members are based on a set of values shared by the profession (Grebe, 1992). Dworkin et al (1991) define a

profession as having a defined body of knowledge, skills and standards. They and Benjamin (1990) suggest that mediation's evolution from multidisciplinary roots has provided a confused sense of identity and that blurred roles result from the separation of mediation from its early association with law, mental health, economics, health and others. Though mediation is on the verge of becoming a profession, according to Benjamin, it does not fit strict definitions of a profession; there is no independent standardized or scientific body of knowledge that is unique to it.

Moore (1983) indicates five procedures used to signify entry into a profession and assure high standards--licensure, certification, accreditation, registration and subscription to a standard of practice. He states that existing studies have found no correlation between mediators' previous educational or professional background and rate of settlement. He concludes that experience is a key ingredient in explaining mediated outcomes and that training mediators is necessary for quality control and accountability.

Bartoletti and Stark (1991) advocate and discuss a mediator-in-training program which is based on internship. The growth in divorce mediation and the lack of standards, suggests that specialized training, practice, and professional guidelines are needed. Bartoletti and Stark

indicate a parallel exists between other professions, such as law and medicine and mediation, with regard to the intense practice of internship.

Honeyman (1988) conducted a study that divided mediation into five elements to aid in the understanding of what a mediator does and how to do it better. This project was constructed as a hiring exam. Mediation can be divided into five skill-based elements--investigation, empathy, invention, persuasion and distraction. Honeyman (1990), through field research, created seven parameters of mediator skills in order to assist in evaluating mediators.

Honeyman's (1990) work was in response to the sustaining belief within the field, that the choice in methods used by mediators, is so personal that evaluation would seem to defy analysis. "It has been said that of all professions, only the mediator works without tools and without rules" (Honeyman, 1990 p. 73). With the conventional practice of mediation, three criteria have traditionally been used to judge performance--rates of settlement, opinion of the parties, and the mediator's reputation. Honeyman's seven parameters include five types of skills--investigation, empathy, invention and problem-solving, persuasion and presentation skills, and distraction to reduce tensions, as well as two experience-related parameters--the ability to manage the interaction, and substantive knowledge.

Honoroff, Matz and O'Connor (1990) conclude that vague measures of a mediator's ability when selecting mediators, such as success rates, educational degrees, hours training, and an "I-know-it-when-I see-it" attitude (p. 37) were insufficient. Utilizing and updating Honeyman's (1988, 1990) five skill areas--investigation, inventiveness, empathy, persuasion, and distraction, they designed and tested an evaluation process for selecting 25 new mediators for the Massachusetts court mediation program from about 100 applicants.

Honeyman (1993), in conjunction with a group of mediation specialists (utilizing his previous work and data from the work of Honoroff, Matz and O'Connor, 1990), under the auspices of the Society of Professionals in Dispute Resolution (SPIDR), and with funding from the National Institute for Dispute Resolution (NIDR), created the *Interim Guidelines for Selecting Mediators*, a performance-based assessment tool. NIDR printed these guidelines in March 1993. The guidelines are composed of a number of tasks mediators perform. Associated with these tasks are a set of "knowledge, skills, abilities, and other factors" (KSOA's) which enable a person to perform the tasks.

The final portion of the project was to devise a set of scales under each of seven evaluation criteria (based on Honeyman's earlier works) of investigation (the scale under investigation includes gathering information through tough

and uncomfortable questions)--empathy, impartiality, generating options, generating agreements, managing the interaction, and substantive knowledge. These evaluation criteria are utilized in a role-playing performance by perspective mediators to evaluate potential mediators as well as pointing out potential areas of needed training. The creation of the Guidelines was in response to the old saw that mediation is an art, not a science.

The printing of these guidelines has sparked a number of responses (a copy of the Interim Guidelines is included in the Honeyman, 1993, article). Dingwall (1993) considers the Interim Guidelines a welcome addition to the less expensive paper-and-pencil tests normally used to evaluate mediators and points to the usefulness of testing mediator performance.

Salem (1993) suggests that the Interim Guidelines omit reference to gaining the parties' trust, or empathic listening skills, at the same time posing the mediator as an investigator who needs to ferret out the truth with "tough questioning". Menkel-Meadow (1993) also questions the mediator's goal as being to ask "uncomfortable" questions. She notes the omission of any reference to ethical conduct and she questions the use of these standards to screen mediators, possibly creating a "culture of evaluative criteria" (p. 324) which leaves out other "artful" ways of implementing mediation.

McEwen (1993) is concerned that a competency-based examination of mediator skills may promote a single style of mediation and concludes that the Guidelines favor the activist model of mediation over the non-directive model.

Bush (1993) suggests that though the authors of the Interim Guidelines share the following principles and aims of mediation, the parties themselves, not the mediator decide how and whether issues are defined and resolved. Yet he finds in the Guidelines that mediators "define and clarify the issues, and "distinguish significant and insignificant issues" (p.343). He points out the wording in the Guidelines needs to be clear and definitive because one of a mediator's greatest challenges is not in controlling the agenda but how to keep control in the parties' hands.

The SPIDR standards include provisions for impartiality of the mediator, yet those standards also state that the mediator must be satisfied that the agreements do not jeopardize the integrity of the process (Grebe, 1992). The mediation literature contains numerous conflicting opinions as to what can properly be a defining characteristic of the process. Are impartiality and participant responsibility for outcomes essential elements of the process? If they are, how can mediators determine which stance is most appropriate in each mediation situation.

CHAPTER V

CONCLUSION

A Critical Look at Mediation

Silbey (1993) investigated the Interim Guidelines for Selecting Mediators (Honeyman, 1993) and found that the Guidelines preserve mythologies which have continued to characterize mediation. The central myth, is "that the mediator is a passive and neutral facilitator in an innovative process of informal, nonbinding dispute resolution" (p. 350). She suggests that as far as innovative process, mediation has been practiced formally and informally for centuries.

Silbey (1993) continues with the claim in the Guidelines that mediation is an informal individualized process (which implies that there exist no specified rules for the procedure). The authors of the Guidelines worked hard to develop standards of practice, yet perpetuate the myth that mediation is an informal individualized process. Silbey (1993) finds that mediation is a routinized and often institutionalized process. The Guidelines perpetuate the myth that the third party is neutrality. Silbey suggests

that mediators are not disinterested or neutral with respect to several aspects of mediation. She submits that they are not neutral with regard to the value of the process, the importance of resolving disputes, the interests of their profession, or even the parties involved. In the context of international mediation, neutrality is not an issue while it is considered important to labor and community mediation.

Another myth, according to Silbey (1993), is that mediation is an unofficial, nonbinding, nonauthoritative process. Mandatory mediation has become institutionalized, participation is not always voluntary. Silbey suggests that the most widely perpetuated myth within the mediation field is that the third party lacks authority and power. She indicates that "this tenet is central to the entire conception, practice and mythology of mediation" (p. 352). Mediators act with power and authority, and research is replete with examples of mediator manipulation of interactions in order to control and shape the outcomes.

Silbey's final myth is that mediation is more efficient, effective and cost-saving than other processes. She conceded that mediation is less expensive than litigation, but research shows outcomes do not appear to differ from litigation or arbitration. She cites studies in which women are shown to systematically come out with less financial support and smaller property settlements with mediation (though Kressel & Pruitt, 1989 find the picture

mixed as far as women's satisfaction with the process).

Wall and Lynn (1993) suggest as well that the tenet of self-determination in mediation can be described as a myth. They describe as well the myth of neutrality and the myth of fairness. As has been shown, mediators may exhibit the behaviors attributed to neutrality, yet mediators also select tactics related to preconceived, predicted outcomes which thwart fairness and impartiality (Wall & Lynn).

Harrington and Merry (1988) contend that neutrality is a central symbol of the practice of mediation and it aids in the promotion and conceptualization of community mediation. Neutrality of mediators, in the form of a detached stance, is cultivated and rewarded. Community mediation centers utilize a process of filtering out mediators who did not fit with their ideological values. They tend to select educated, professional people and eliminate mediators with close ties to the community, who may find a detached stance unnatural. This filtering out of less professional community members from the process of mediation suggests that community mediation may not represent the community.

Contradictions Within the Mediation Literature

Much of this study has contributed to the conclusion that mediation is not a uniformly-practiced procedure. Questions such as whether mediation is a voluntary process, whether a mediator is neutral or needs to accept

responsibility for the fairness of the agreement, whether the mediator directs the process and substance of the dispute using directive tactics, or whether the participants direct the process and participate in the resolution continue to emerge throughout the literature. Silbey (1993), Harrington and Merry (1988) suggest that these tenets of mediation are in reality myths.

The mediation literature discusses the concept of mandatory mediation. The debate centers on the premise that parties required to take part in the process of mediation can develop a voluntarily agreed upon resolution. This debate raises important questions. If disputants are remanded to mediation, can the outcome remain fair to the parties? Do the parties participate in the process in the same manner as parties who are not required to participate in mediation? The literature does not answer these questions. Research shows that mediation as a process varies considerably within the different contexts and circumstances in which occurs. Certainly mandatory mediation is occuring, it is accepted practice and it is institutionalized in many states.

When judges mediate, considering their position of power, is this process in keeping with voluntary participation? Is the legally mandated process of mediation able to maintain the integrity of the principle of voluntary, active disputant participation? Proponents of

mandatory mediation indicate that though participation is required, an agreement is not required. Opponents suggest that mandatory mediation has the capacity to interfere with the parties rights of access to legal process. Is mandatory mediation "true" mediation, or is mediation not truly voluntary? I would suggest that mandatory mediation is mediation and that mediation is not always voluntary. This suggests a contradiction in the literature which claims that mediation is a voluntary process. The profession of mediation would benefit by clarification of this issue and accepting mandatory mediation as one of the many mediation processes.

The issue of neutrality, considered a central principle of mediation, is discussed widely in the literature, though seldom defined. Practicing mediators are concerned with the ability to demonstrate freedom from bias. Neutrality is established as a principle of mediation by the many professional standards (SPIDR, AMA, and AFM). What is meant by neutrality or impartiality is not as easily discovered. Neutrality can mean balancing power when there is an obvious imbalance between the parties. It can mean remaining equidistant from either party. Neutrality can mean the mediator keeps her/his emotions, biases and values from interfering with the process.

The concept of neutrality raises important questions. Is the mediator neutral to the parties, to the dispute, or

to the process? When is neutrality important and what specifically constitutes neutrality. These questions must be answered by the individual mediator and are mitigated by the mediator's training and the context in which mediation occurs. The numerous processes within the different contexts of mediation lead to differing expectations regarding neutrality.

The issue of neutrality is clouded with other issues--power in mediation and directive mediation tactics. The interventionist model of mediation suggests a directive process which concedes a mediator's decision to intervene on behalf of one or more of the parties. The neutralist model indicates a facilitative approach to mediation. The mediator guards the process allowing the the disputants active participation in the decision-making. The decision to act in either an interventionist or a neutralist manner is made by the mediator. Numerous circumstances inform this decision.

The use of directive mediator tactics is debated widely in the literature. Mediator influence over the substance and terms of settlements is extensive, mediators make judgments about how disputes should be settled and direct their interaction towards those ends. Professional standards of mediation impose the principle of self-determination. The literature suggests the parties participate in the process, yet instances of directive

mediation are described as important in some contexts. If mediators choose to utilize directive tactics in the name of power balancing, special skill is necessary to ensure the disputants interests are maintained. The debate whether disputants actively participate in mediation or whether mediators use directive tactics cannot be answered without looking at the different contexts and circumstances of mediation. The ultimate decision with regard to this issue is made by the mediator within her/his training and the context of the mediation.

Mediation covers a wide spectrum of processes, some not unlike the legal process. It is impossible to describe one single process that is mediation without leaving out numerous other processes that equally constitute mediation. Much of what occurs in mediation is controlled by the mediator. Though much of the literature describes mediation as a voluntary process with disputant participation, conducted by an impartial third party who does not control the outcome. This ideal is not always the case. The literature justifies these contradictory expectations within the mediation process. The different contexts and circumstances of mediation contribute to these contradictions within mediation.

As mediation becomes associated with the legal system and attorneys mediate, the adversarial system informs mediation practice. Attorneys bring a legal bias. The

AMA's mediation standards expect parties to be represented by attorneys while they participate in mediation. This expectation contradicts the tenet of disputant participation. The requirement of parties to council with attorneys, and the adversarial model that exists in the legal system precludes disputants from self-determination and utilizing principles of negotiation from enlightened self-interests. If the focus in mediation is solely on each party's interests without regard to mutual interests, the result is a win-lose perspective without the benefit of a creative win-win opportunity.

Kolb and Kolb (1993) question whether the practice of mediation can be reduced to a defined set of behavioral activities. Stamato (1992) suggests there is no one process appropriate for handling all or even most mediation situations. Mediation covers such a wide spectrum of actions that only general definitions can encompass all of them. Without consensual identification, mediation is increasingly coming to mean almost any type of intervention. Only generic, broad definitions of mediation are able to encompass the wide range of uses and meanings of mediation found in the literature. The mediation process is indistinguishable from many other process based on definition. Mediators are the guardians of the practice of mediation. Mediators needs to be ultimately aware of these numerous contradictory issues in mediation.

Art or Science

With mediation's emergence from such multi-disciplinary roots has come a confused sense of identity. Many researchers have addressed the question whether mediation is an art or a science. Haynes (1988) distinguishes mediation from arbitration, which he considers more science than art. Arbitration uses established principles for interpretation of contract and law, whereas he views mediation as more art than science because it relies on the mediator's skills in assessing the situation, and assisting parties to communicate, develop, and accept resolutions.

Menkel-Meadow (1993) suggests that mediation encompasses potential repertoires of behaviors that are difficult to characterize, but contribute to the success of mediation. Mediators contribute an ominous presence, a serendipitous orchestration, or a particularly tactful intervention or outlook to the mediation process which results in resolution. She classifies these activities as art because they do not adhere to specific scientific standards.

Douglas (1962) characterizes the mediator as a solitary artisan who has no science to navigate him/her through the rough seas of the process. She found that mediators are different in their choice or activities, or their practice of the art, "where timing and inspiration are everything"

(p. 108). She considers mediation more art than science with its informal free-flowing process and unpredictable outcome.

Bush (1993) indicates that the conception of mediation as an art helps excuse practitioners from developing standards of practice as well as explicit clarity about what mediators do. Maggiolo (1985) concurs that practitioners have viewed mediation as pure art, therefore not subject to analysis or definition. He concludes that there may be artistic interpretation within mediation, but the application of particular prescribed techniques in the appropriate situation is the true art of mediation.

Concluding Reflections

Research on mediation often fails to provide details about the specific mediation and the control procedures under study. A multitude of different procedures can be found under the mediation name, including some that do not differ significantly from those used by courts and lawyers. Often it is not clear just what is being evaluated in these studies. Sheppard (1984) suggests the need for "an all-encompassing grammar permitting researchers and practitioners to describe precisely the intervention they are using" (p. 146).

Friedland (1990) indicates that the theory and the practice of mediation must develop and maintain a

cooperative dialogue. The uniqueness of theorists and practitioners should not be ignored and they should engage in constant dialogue for mutual benefit. Stuart and Jacobson (1987) indicate that the absence of an underlying theory might be attributed to the fact that mediators are drawn from different backgrounds that have inconsistent values and methods.

The current condition of mediation exists as a result of a gulf between theory and practice. Practitioners from diverse backgrounds utilize the language of their primary professions. This, combined with the lack of clearly defined empirical referents regarding mediation, contributes to a lack of consensus on what properly constitutes mediation practice. Given mediation's complexity, it remains difficult to develop a theory that accounts for all of the extant empirical findings. The use of mediation techniques has not kept up with the development of theory. Kiely and Crary (1986) suggest (as well as others) that when one looks at the literature for a coherent theory of mediation, the picture becomes vague and disappointing.

Kressel & Pruitt (1989) suggest that research and literature on mediation's effects is fraught with methodological problems. One problem is the absence of controls for placebo effects. People often draw benefit from a novel intriguing and enthusiastically-administered form of treatment when the treatment itself has no inherent

merit, creating a heightened propensity to contaminate attitudinal measures such as satisfaction. They suggest that field-experimental designs are very much needed. Researchers agree that mediation theory and research has not kept up with practice.

Though there are a myriad of forms that mediation can assume, it has become a common form of dispute resolution in an increasing number of areas. It has proven itself popular and useful. Rather than reiterating the need for further empirical studies to explicate just what the term mediation means, Sheppard (1984) suggests creating a general framework, a taxonomy of conflict intervention procedures as well as a method of choosing and evaluating these procedures.

The literature supports the premise that mediation has increased in popularity, from the number of related abstracts found in the psychological abstracts during the 1980s, to the many authors who find it increasing in popularity and in the many areas of use. What is the cause of this increase in popularity and use? Burton and Sandole (1986) believe that it is a result of a paradigm shift that has occurred within thinking in the field of conflict resolution. Mediation is a response to a change in thinking in which the parties can accept responsibility and participate in the resolution or management of their conflicts. This change locates the responsibility for

resolution of conflict within the individual rather than an outside autocratic process.

Mediation is a response to this change. Mediation allows disputant participation in decision making rather than outside, state control over dispute resolution. Mediation allows disputants to participate. It increases their awareness of communication skills and practices, which they can use in other areas of their lives, according to Blades (1984). She and Folberg (1983) find that mediation helps participants to enhance their communication and provide a model for future conflict resolution. Mediation equips the parties with a learning experience and with skills.

Blades (1984), Menkel-Meadow (1993) and Harrington and Merry (1988) suggest that a goal of mediation is personal growth. Personal growth is a popular concept in current American society. Mediation is appealing to members of this culture because it provides an opportunity to learn skills and to participate in personal growth. Davis (1993), a mediator himself, says that "the field is peopled with former activists - civil rights, the peace movement, the women's movement..." (p. 7). He suggests that people are drawn to the field of mediation by the problem-solving nature and the promise of empowerment. Mediators and disputants are attracted to the process by what it has to offer them, an opportunity to make a difference, to learn,

and to participate in a problem-solving process in which they are very much a part of the process.

The mediation literature is charged with contradictory issues--neutrality, non-directive mediator, voluntary process, disputant participation, as well as others, yet the practice of mediation continues to attract attention, experience growth, and popularity as a process of alternative dispute resolution. Mediation continues as a process not unlike other human-designed processes. It has it's contradictions on the one hand and it's usefulness on the other. It helps people to learn skills. It is attractive because it allows individuals to participate, to feel the accomplishment of participation and resolution within their own hands. Mediation continues to allow parties to take hold of a process that can impact their lives, extending a sense of empowerment.

This study concludes that mediation is both mandatory and voluntary. Mediators are not neutral. They bring their own biases and preferences to the process. Mediators can choose to allow the process of mediation to remain impartial even though they themselves may not be impartial. Mediators may choose to empower the weaker party in the dispute, or may choose not to continue the process when they believe the parties may agree on an unfair settlement. The process is directed by mediators, and the amount of disputant participation is mitigated by the behaviors of the mediator.

As in any profession, the responsibility for the ethics, the practice, and the development of the mediation field falls into the hands of the practitioner. Mediation is in the hands of the mediator, art or science.

While research shows that agreements reached under mediation are not unlike agreements made under other methods, satisfaction with the mediation process is high among users. Though research shows that parties may be reluctant to enter into the process, satisfaction remains high, once parties enter into the process. Mediation allows individuals an opportunity to place their own hands on their own problems and affect the outcome, to participate and come away with a creation of their own. Mediation like other human-designed processes is not a perfect process. It is at the mercy of the person called the mediator. It is never-the-less a step towards individual participation and ownership of problem-solving.

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